DOCUMENT RESUME

ED 278 595 SO 017 879

AUTHOR	Semonche, John E., Ed.
TITLE	Religion and Law in American History. Church, State and the First Amendment: A North Carolina Dialogue.
INSTITUTION	North Carolina Univ., Chapel Hill.
SPONS AGENCY	National Endowment for the Humanities (NFAH), Washington, D.C.
PUB DATE	85
NOTE	135p.; Prepared under the auspices of the Program in the Humanities and Human Values. For related documents, see SO 017 880-881.
PUB TYPE	Reports - Descriptive (141)
EDRS PRICE	MF01/PC06 Plus Postage.
DESCRIPTORS	*Churches; *Civil Liberties; Civil Rights; *Constitutional History; Government Role; *Religion; *Religious Differences; Religious Factors; State Church Separation; *United States History

ABSTRACT

This two-part anthology contains a series of background readings on church-state issues designed to provide primary materials through which North Carolinians can better understand the religion clauses of the First Amendment. Part 1 gives historical and philosophical background in four chapters: (1) "God's Country: Perception or Presumption?"; (2) "Near the Beginning: Should God's Realm Be Separated from Man's?"; (3) "The Rights of Man and Other Bases for Religious Liberty: A Practical Accommodation or a Moral Imperative?"; and (4) "The Constitutional Foundation: What Did the Religious Clauses Mean?" Part 2 describes the legal experience in four chapters numbered sequentially from part 1: (5) "The Basic Cases: What Limits Do the Religion Clauses Place Upon the States?"; (6) "Free Exercise of Religion: How Much Room Should Government Allow?"; (7) "School Prayer and Financial Assistance: What Tends To Establish Religion?"; and (8) "Historical Exceptions: Does Custom Equal Constitutionality?" Each chapter contains readings and questions for discussion. A list of suggestions for additional reading is included. (KWL)

****
* Reproductions supplied by EDRS are the best that can be made *
* from the original document. *
****

ED278595

Religion and Law in American History

edited by

John E. Semonche

U.S. DEPARTMENT OF EDUCATION
Office of Educational Research and Improvement
EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)

✓ This document has been reproduced as received from the person or organization originating it.

☐ Minor changes have been made to improve reproduction quality.

• Points of view or opinions stated in this document do not necessarily represent official OERI position or policy.

"PERMISSION TO REPRODUCE THIS MATERIAL HAS BEEN GRANTED BY

S. Diane Sasson

TO THE EDUCATIONAL RESOURCES INFORMATION CENTER (ERIC)."

SO017879

CHURCH, STATE and the FIRST AMENDMENT:

A North Carolina Dialogue

BEST COPY AVAILABLE

Sponsored by:
The Program in the Humanities and Human Values of The University of North Carolina at Chapel Hill under a grant from The National Endowment for the Humanities

Religion and Law in American History edited by John E. Semonche

Amendment 1

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

Major funding for CHURCH, STATE AND THE FIRST AMENDMENT: A NORTH CAROLINA DIALOGUE has been provided under a grant from the National Endowment for the Humanities.

Copyright © 1985
University of North Carolina at Chapel Hill
Manufactured in the United States of America

CHURCH, STATE AND THE FIRST AMENDMENT: A NORTH CAROLINA DIALOGUE

Volume I: *Religion and Government in Other Countries*
Edited by James C. Livingston

Professor Livingston teaches in the Department of Religion at the College of William and Mary. The author of *Modern Christian Thought: From the Enlightenment to Vatican II*, he recently edited an anthology entitled *Religious Thought in the Eighteenth Century*. In *Religion and Government in Other Countries*, Professor Livingston presents readings on the role of religion in other societies: the Islamic Republic of Iran, England, France, Germany, the USSR, and Israel. This anthology provides foreign models against which we can judge the strengths and the weaknesses of our own constitutional arrangements.

Volume II: *Religion and Law in American History*
Edited by John E. Semonche

Professor Semonche, a lawyer and historian, teaches American constitutional and legal history in the Department of History at the University of North Carolina at Chapel Hill. He is the author of *Charting the Future: The Supreme Court Responds to a Changing Society, 1890-1920* and *Ray Stannard Baker: A Quest for Democracy in Modern America, 1870-1918*. In Part I of this anthology, Professor Semonche presents selections which address the historical and philosophical background of the religion clauses. In Part II he presents selections from the major court opinions on the relationship of religion and government.

Volume III: *Church, State and American Culture*
Edited by Giles Gunn

Professor Gunn is a member of the Department of Religious Studies and the Curriculum in American Studies at the University of North Carolina at Chapel Hill. The author of a number of studies on religion and literature, Professor Gunn recently edited *New World Metaphysics* and *The Bible and American Arts and Letters*. He is also the author of *The Interpretation of Otherness*. In *Church, State and American Culture*, he presents readings on the tensions between America's strong religious heritage and the secularism of her fundamental law.

Volume IV: *Church, State and Education*
Edited by Waldo Beach

Professor Beach teaches in the Divinity School of Duke University. Among his publications are *Christian Community and American Society*, *The Wheel and the Cross: A Christian Response to the Technological Revolution*, and *The Christian Life*. In this anthology, he includes readings on the school prayer controversy, the creationism-evolution debate, the 'humanism'in-the-schools dispute, and government regulation of religious schools.

These anthologies are available for use in community programs sponsored by non-profit organizations.To obtain copies, contact CHURCH, STATE AND THE FIRST AMENDMENT: A NORTH CAROLINA DIALOGUE, 209 Abernethy Hall, University of North Carolina at Chapel Hill, Chapel Hill, NC 27514.

North Carolina Dialogue
Advisory Committee

James O. Abrahamson, Pastor
Chapel Hill Bible Church

James Bond, Professor of Law
Wake Forest University

David Bowman, Pastor
First Presbyterian Church
Rocky Mount, NC

Peter Fish, Professor of Political Science
Duke University

Edward G. Holley, Dean
School of Library Science
University of North Carolina at Chapel Hill

Pamela S. Mayer, Superintendent
Chapel Hill-Carrboro School System

Warren A. Nord, Director
Program in the Humanities and Human Values
University of North Carolina at Chapel Hill

John V. Orth, Associate Professor of Law
University of North Carolina at Chapel Hill

J. Dickson Phillips, Jr., Judge
U.S. Court of Appeals for the Fourth Circuit

Gerald J. Postema, Associate Professor of Philosophy
University of North Carolina at Chapel Hill

Walter F. Pratt, Jr., Associate Professor of Law
Duke University

Prezell Robinson, President
St. Augustine's College

A. C. Snow, Editor
The Raleigh Times

Arnold S. Task, Rabbi
Temple Emanuel
Greensboro, NC

Grant Wacker, Assistant Professor of Religious Studies
University of North Carolina at Chapel Hill

Project Director

Diane Sasson
Program in the Humanities and Human Values
University of North Carolina at Chapel Hill

Preface

Throughout the 1984 national election a debate raged over the proper relationship between church and state in this country. News magazines devoted cover stories to the topic. Talkshows featured prominent religious leaders, politicians, and civil libertarians who offered their opinions on issues ranging from school prayer to the nuclear freeze. In nationally televised debates President Ronald Reagan and former Vice President Walter Mondale confronted questions about their personal religious beliefs and how these beliefs might affect their decisions in public office. Concerned clergymen signed a statement warning of the dangers of "Armageddon theology." Emotions ran high and disagreements were sharp. Although the 1984 election is past, Americans continue to struggle with the proper role of religion in politics, education, and culture.

Yet despite the quantity of discussion, the quality of the debate is often not of the caliber we would wish. Too often we talk past each other; too often we fail to listen to what others say. Because in a pluralistic society we Americans are divided by basic and frequently unnoticed assumptions about religion, the purposes of the state, and the principles of constitutional law, we frequently fail to recognize the underlying reasons for our disagreements.

CHURCH, STATE AND THE FIRST AMENDMENT: A NORTH CAROLINA DIALOGUE seeks to provide citizens of the state with opportunities to examine closely the meaning of the two religion clauses of the First Amendment. Through public forums and debates, community programs, study groups, and radio and television documentaries, this project encourages North Carolinians to place church-state issues into broader historical, religious and philosophical contexts, and to gain a wider perspective on the separation of church and state in America by comparing it with the relationship between religion and government in other countries.

This anthology is one of four collections of background readings on church-state issues designed to provide primary materials through which North Carolinians can better understand the religion clauses of the First Amendment. Each anthology has been edited by an acknowledged scholar. With insight into the complexities of the topic and fairness to divergent points of view, these editors have selected materials representing a wide range of philosophical, religious, and political perspectives. They have included historical and legal documents, essays by philosophers and observers of the American scene, as well as newspaper and magazine articles. Readers will therefore find in these anthologies both "A Secular Humanist Declaration" and "A Christian Manifesto." They will discover selections from the "left" and from the "right," as well as from authors who strive for a middle ground. In no case is the aim of an anthology to tell readers what to think about these issues; rather each anthology seeks to provide readers with a better basis for civil and informed dialogue on questions confronting our society. We hope that these four collections of readings on church-state relations will contribute to serious inquiry into the place of religion in American society and that they will help us talk and listen to each other about issues which vitally affect us all.

CHURCH, STATE AND THE FIRST AMENDMENT: A NORTH CAROLINA DIALOGUE is sponsored by the Program in the Humanities and Human Values of the College of Arts and Sciences at the University of North Carolina at Chapel Hill. The mission of the Program is, in part, to develop and sponsor a wide variety of educational programs for the public of North Carolina which bring to bear the perspective of the humanities on important social, moral, and cultural issues. Major funding for this project has been provided by the National Endowment for the Humanities. We are grateful to the Endowment for their generous support.

I wish to thank Warren Nord, Director of the Humanities Program, whose idea this project originally was; Richard Schramm, who was the first project director; and Patricia Owens, the Humanities Program secretary. The Publications staff of the Division of Extension and Continuing Education at the University of North Carolina at Chapel Hill has put long hours into the preparation of these anthologies. I am particularly grateful to June Blackwelder, Mary Marshall Culp, Donna Marlette and Julia Klarmann for their patience and attention to detail. Marcia Decker and Marie Evans provided assistance with proofing and layout. I also appreciate the help provided by the staff of the Davis Library at UNC-Chapel Hill, especially that of Mary Ishaq and the Humanities Reference Department. The Project Advisors for CHURCH, STATE AND THE FIRST AMENDMENT read manuscripts of the anthologies and offered valuable suggestions. The Printing and Duplicating Department at UNC-Chapel Hill printed and bound the volumes. Most importantly, I thank the editors of the anthologies. They have succeeded in the difficult task of making complex issues understandable to a non-academic audience, and they have accepted suggestions for changes without losing their sense of humor.

Diane Sasson
Project Director

Table of Contents

Anthologies in this Series

North Carolina Dialogue Advisory Committee

Preface

Table of Contents

Introduction 1

Part I: The Historical and Philosophical Background 6

Chapter One: God's Country: Perception or Presumption? 8
Reading 1: John Winthrop, "A Model of Christian Charity" 8
Reading 2: John Winthrop, "Defense Against Charge of Exceeding His Powers" 10
Reading 3: John Wise, *A Vindication of the Government of New England Churches* 10
Reading 4: Ezra Stiles, "The United States Elevated to Glory and Honor..." 12
Reading 5: Letter to George Washington from Hebrew Congregation in Newport 15
Reading 6: Washington's First Inaugural Address 15
Reading 7: Lincoln's Second Inaugural Address 16
Reading 8: Kennedy's Inaugural Address 17
Reading 9: Josiah Strong, *Our Country: Its Possible Future and Its Present Crisis* 18
Questions for Discussion 20

Chapter Two: Near the Beginning: Should God's Realm Be Separated from Man's? 21
Reading 10: John Cotton, from *The Bloudy Tenent, Washed* 22
Reading 11: John Cotton, from *A Brief Exposition* 23
Reading 12: John Cotton, from *A Practical Commentary* 23
Reading 13: John Cotton, from *The Bloudy Tenent of Persecution* 23
Reading 14: Roger Williams, Letter to the Town of Providence 26
Reading 15: Maryland Toleration Act 26
Reading 16: William Penn, *The Great Case of Liberty of Conscience* 27
Reading 17: John Locke, "A Letter Concerning Toleration" 31
Questions for Discussion 34

Chapter Three: The Rights of Man and Other Bases for Religious Liberty: A Practical Accommodation or a Moral Imperative? 35
Reading 18: John Locke, *Second Treatise on Government* 36
Reading 19: *Declaration of Independence* 37
Reading 20: Memorial to General Assembly of Virginia from Presbytery of Hanover 38
Reading 21: Thomas Jefferson, from *Notes on Virginia* 39
Reading 22: James Madison, "A Memorial and Remonstrance on the Religious Rights of Man" 41
Reading 23: Thomas Jefferson, Virginia Statute of Religious Liberty 44
Reading 24: Henry Highland Garnet, "Address to the Slaves of the United States of America" 45
Reading 25: John Stuart Mill, *On Liberty* 48
Reading 26: John Rawls, from *A Theory of Justice* 53
Questions for Discussion 59

Chapter Four: The Constitutional Foundation: What Did the Religious Clauses Mean? 60
Reading 27: Article VI, U.S. Constitution 60
Reading 28: Oliver Ellsworth, On Religious Tests from "Letters to a Landholder" 61
Reading 29: Anson Phelps Stokes, from *Church and State in the United States* 62
Reading 30: First Amendment, U.S. Constitution 68
Questions for Discussion 69

Part II: The Legal Experience 70

Chapter Five: The Basic Cases: What Limits Do the Religion Clauses Place Upon the States? 72
Reading 31: from *Cantwell v. Connecticut* 72
Reading 32: from *West Virginia v. Barnette* 74
Reading 33: from *Everson v. Board of Education* 76
Reading 34: from *McCollum v. Board of Education* 79
Reading 35: from *Zorach v. Clauson* 82
Reading 36: from *McGowan v. Maryland* 84
Questions for Discussion 85

Chapter Six: Free Exercise of Religion: How Much Room Should Government Allow? 86
Reading 37: from *Reynolds v. United States* 87
Reading 38: from *Braunfield v. Brown* 88
Reading 39: from *Sherbert v. Verner* 89
Reading 40: from *Welsh v. United States* 91
Reading 41: from *Wisconsin v. Yoder* 93
Reading 42: from *Thomas v. Review Board* 96
Reading 43: from *United States v. Lee* 97
Questions for Discussion 98

Chapter Seven: School Prayer and Financial Assistance: What Tends to Establish Religion? 99
Reading 44: from *Engel v. Vitale* 99
Reading 45: from *Abington School District v. Schempp* 101
Reading 46: from *Lemon v. Kurtzman* and *Earley v. DiCenso* 104
Reading 47: from *Tilton v. Richardson* 106
Reading 48: from *Mueller v. Allen* 107
Questions for Discussion 109

Chapter Eight: Historical Exceptions: Does Custom Equal Constitutionality? 110
Reading 49: from *Walz v. Tax Commission* 110
Reading 50: from *Marsh v. Chambers* 114
Reading 51: from *Lynch v. Donnelly* 117
Questions for Discussion 123

Suggestions for Additional Reading 124

Introduction

General Introduction

NATIONAL RELIGIOUS ORGANIZATIONS ASK SUPREME COURT TO OVERTURN REV. MOON'S CONVICTION FOR FILING FALSE TAX RETURNS

ADMINISTRATION-SPONSORED BILL ALLOWING STUDENT RELIGIOUS GROUPS TO MEET IN PUBLIC SCHOOLS FINALLY PASSES CONGRESS

SUPREME COURT SAYS PAWTUCKET, R.I., CAN DISPLAY NATIVITY SCENE DURING CHRISTMAS SEASON

REAGAN-SUPPORTED SCHOOL PRAYER AMENDMENT FAILS TO PASS SENATE

SUPREME COURT AGAIN VETOES SCHOOL PRAYER, BUT AGREES TO RULE ON A MINUTE OF SILENCE

DIPLOMATIC RELATIONS ESTABLISHED WITH VATICAN AFTER 117-YEAR LAPSE

If any reminder is needed, the above headlines, drawn from news reports in 1984, highlight the present concern over the question of the proper or desirable relationship between religion and government in the United States. As we approach the bicentennial of the framing of the Constitution and the Bill of Rights, the religion clauses of the First Amendment, more than any other constitutional provisions, have become a primary focus of public attention and controversy.

A tale of two North Carolina Senators will serve to illustrate the nature of this controversy.

Recently former North Carolina Senator Sam J. Ervin was interviewed and asked what he considered the greatest present threat to the Constitution. Obviously agitated, he pounded his desk and replied: "Reagan's efforts to exploit religion for political purposes."[1]

Before his retirement in 1974, Senator Sam had served for twenty years in the United States Senate. Well before his chairmanship of the Senate Watergate Hearing, he had achieved national visibility, in part because of his steadfast opposition in the 1960s to a Congressional attempt to reverse by constitutional amendment the Supreme Court's ban on school prayer. Although it struck some observers as strange that a Senator from the Bible Belt would take such a position, Sam Ervin believed that the Constitution did command such a separation between religion and government. His colleagues in the Senate respected his judgment as a constitutional scholar. A deeply religious man who quotes the Bible frequently, Senator Sam defers to no man in his belief "that faith in God is the most potent force in the universe." But he argues that faith is not something that can be prescribed by government and that officially-sponsored prayer in the public schools can never truly be voluntary. When the proposed school prayer amendment was defeated in 1966, he prayed that the issue would never return to the legislative halls of Congress. So, how does he explain the return? Citing the Biblical saying "that the fervent prayer of a righteous man availeth much . . .," he concludes that, since the fervency of his prayer could not be doubted, he "wasn't righteous." Giving human nature its due, he adds: "There have always been people in society who wanted to regulate other people's beliefs."[2]

It is indeed ironic that Senator Ervin's successor as senior Senator from North Carolina, Jesse Helms, has, from his first arrival on Capitol Hill, been a leader in the movement to override the Supreme Court's decision on the constitutionality of officially-sponsored school prayer. Considering the Court decision "an outrageous intrusion into the legislative process," Senator Helms has steadfastly battled for a cause that he embraced well before embarking upon his political career. Arguing "that we owe Providence our prayers," and that reinstituting prayer in the schools will teach the self-denial and discipline needed for effective learning, he condemns the Supreme Court for placing "an alien graft on the American body politic . . . against the natural rights and traditional

liberties of the people."[3] He has supported the proposal for a constitutional amendment, but he has always maintained that the Congress has the authority to deprive the federal courts of jurisdiction in the matter.

This tale of two North Carolina Senators with their own national constituencies dramatizes the deep division that characterizes our present society. The differences we see cannot be explained by party labels or by facile comments about a growing conservatism in the American body politic. Both men were and are conservatives. Both men opposed the Equal Rights Amendment and both men fundamentally question civil rights legislation. Certainly no one would want to argue that one man was more personally religious than the other. What, then, separates the men on issues of religion and government?

Such a question leads us to matters of fundamental ideas and assumptions. Let us begin with Senator Helms. Although deferring to no one in his support of individual economic rights, the Senator has long crusaded against what he has considered the improper interference of the federal government in local affairs. He believes that the decisions that affect our lives should be made, if at all possible, at the local or state level. A main target of his attack has been the United States Supreme Court, for, through its interpretation of the Constitution, it has established national standards from which states cannot deviate. He views the Court not as a protector of individual rights but as a usurper of authority. Almost fifty years ago the Court began the process of applying the guarantees of the Federal Bill of Rights as checks upon state action. As part of this process, the Court imposed the prohibitions of the First Amendment's religious clauses upon the states. And in time the Court reached the issue of prayer in the state's public schools and ruled that the practice violated the First Amendment. Senator Helms considers this whole matter of nationalizing the standards of the Federal Bill of Rights a usurpation of the legislative function by the Supreme Court. The Court's response that it is protecting individual rights from abridgement by hostile legislatures is dismissed by Helms as rhetoric cloaking the Court's grab for power.

Helms would leave to the states the resolution of such matters as prayer in the public schools and have the majority will prevail. On this particular matter he feels that the Court's decisions generally ignore the religious nature of the American people, and public opinion polls on the issue of school prayer have tended to lend his position popular support.

In conclusion, what Jesse Helms wants to conserve is a federal system in which considerable discretion on the matter of individual rights is entrusted to the states, along with a clear recognition of the religious heritage of the American nation.

Sam Ervin, on the other hand, while working with the same federal constitution, has greater sympathy for the work of the Supreme Court. This does not mean that the former Senator has hesitated to criticize certain decisions of the Court, for he has not. Rather, he has an understanding of the Court's concern for individual rights and its worry about majority intrusions on such rights. While Jesse Helms hopes that the Court some day will correct its errors of the past half-century, Sam Ervin basically accepts the fundamental changes that have been made and applauds the nationalization of the First Amendment's guarantees.

While some of his colleagues used the usurpation of power argument in the 1960s to gain support for a constitutional amendment overriding the school prayer decision, the Senator felt that the decision was right—that it indicated no hostility to religion and that it properly declared that personal faith was not the government's business.

In conclusion, what Sam Ervin wishes to conserve is a constitutional system that recognizes the rights of man and the dangers posed to those rights by well-meaning majorities. On the religious issue, he wants to preserve the individual's relationship with his God free from governmental interference at any level.

We shall see that some believers in separating religion and government were primarily interested in protecting the government from religion while others were primarily interested in protecting religion from government. Ervin takes the position that each deserves equal protection from penetration by the other. To him, both religious faith and government neutrality on religious matters are values too important to compromise.

However, the position that Jesse Helms represents has its justification, both historical and practical. In many ways Protestant man has been engaged in trying to bring the Heavenly Kingdom to earth. Why should not religious man try to shape society to conform to his religious view? Must his secular activity be divorced from his religious belief; must man be so divided? And has God not

been summoned repeatedly to national service in times of crisis and public ceremony? Words of religious sustenance have dotted public speeches from the beginning of our country. Is it inconsistent with such a heritage for religiously motivated people to seek to impress their beliefs on the secular society?

If more questions have been raised than answered, that is how it must be. Our purpose is not to provide personal answers but rather raise fundamental questions that will take us beyond the glare of specific contemporary issues and the rhetoric that surrounds them to an encounter with the basic premises and assumptions which underly them.

Many of the political and religious leaders of the generation that bequeathed to us the Constitution and the Bill of Rights would have been both amazed and saddened by this turn of events. Well aware that religious differences could fester and disrupt society, they made a virtue of the existing religious diversity. Protecting religious liberty would bolster their new experiment in government, which was restricted from intruding into the religious realm. Those who believed that they possessed religious truth wanted all government to acknowledge this fact, but events escaped their control.

Our religious differences as a people gave rise to a pluralistic society. Talk of a Protestant America not only neglects citizens of other faiths but it also masks the vital and significant differences among Protestant sects. Despite the fact that the nation was born during the Age of Enlightenment, which proclaimed man the master of his earthly destiny and endowed him with natural rights, religious liberty was a practical response to religious diversity. This was the conclusion of James Madison, the Virginia statesman who is often called the father of both the Constitution and the Bill of Rights. He believed that any words written on paper were less of a guarantee of future religious liberty than the diversity that characterized the American population. And when Madison was defending the Constitution drafted at Philadelphia, he found security in such diversity. It insured a cultural pluralism that would tend to bring success to the experiment in republican government, for broadly diverse interests assured that no single interest would be able to control or oppress the others.

Before we attempt to grapple with the fundamental issues behind the present controversy, we need to clear some of the debris that clutters the landscape. There are four matters that merit our attention. First of all, the use of the terms "church" and "state" with regard to the American experience is quite misleading. Although a few state establishments of religion survived the Revolutionary era, they, even in their restricted sphere, bore little resemblance to the established churches in Europe. In reality, there was no "church" in the geographical area that became the United States; that is, no single institution defined religious belief and prescribed the forms of its exercise. In the European model the church was an institutionalized authority that coexisted with a civil authority; they reinforced each other. The American experience with religion made such institutionalization impossible. To endow the term "church" with some overarching theological significance, and then juxtapose it with the authority of the "state" is to talk in terms of abstractions that have no grounding, legal or practical, in American society. Without purging our minds of an archaic formulation, we cannot understand the true nature of the conflict between religious belief and practice and civil authority in the United States.

Secondly, when the First Amendment was added to the Constitution in 1971, its restrictions limited only the federal government. The Amendment's religion clauses, prohibiting laws respecting an establishment of religion and interfering with its free exercise, did not affect the states' full constitutional power to regulate the relationship between religion and government as they saw fit. This is undisputed fact. What gives rise to controversy are two matters: the questions of the legitimacy of applying the religion clauses to the states and of their interpretation. The issue of interpretation occupies a substantial portion of the material in this anthology. What must briefly be addressed here is the manner in which the religion clauses were applied to the states.

In 1868 the Fourteenth Amendment was added to the Constitution as part of the Reconstruction process following the Civil War. Its significant first section was specifically designed to place new limits on state action. Although a primary purpose of the section was to provide equal citizenship for the newly freed blacks, the language was broadly drawn. The pertinent words of the Amendment read: "nor shall any State deprive any person of life, liberty, or property, without due process of law," often commonly referred to as "the due process clause." It is this protection of liberty that the United States Supreme Court has used, since the 1920s, to make the guarantees of the First Amendment and many other provisions of the Bill of Rights applicable to the states. As part of this larger process, the Court read the religion clauses of the First Amendment into the due process protection of the Fourteenth Amendment in the decade of the 1940s. Since that time the Court has consistently taken the position that the states are as bound as the federal government is by the religion clauses in the First Amendment. To detail this development in constitutional law is

beyond our scope, but this brief summary should illuminate what Senator Helms is denouncing as the Court's usurpation of the power of the states and what former Senator Ervin is praising as the national protection of First Amendment rights.

Thirdly, given the pluralistic nature of the nation's religious tradition, it should not be surprising to find that groups eager to pursue their religious teachings come out quite differently on the issue of separating religion and government. While Jerry Falwell and others are seeking to bring more of their religion into government, other Christian groups are fighting to wall off their religion from government interference. Current estimates indicate that fundamentalist Christian schools are proliferating in the United States at the rate of over a thousand a year. A major battle they face concerns state requirements for the certification of teachers. Their supporters claim that the state has no legitimate authority to interfere with the free exercise of their religion. So one camp desires to draw the state closer to religion, as the other seeks more total separation. Clearly, there is no Christian position on the question of the proper relationship between religion and government. And you may well ask whether terms such as "conservative" or "liberal" are any more meaningful.

Finally, we need to recognize the contributions religion, especially Protestantism, has made to the shaping of American society. In the generation that gave us the Constitution and the Bill of Rights, only about ten percent of the population were church members, and "in 1800 there were fewer churches relative to population than at any other time before or since."[4] Whether one looks for an explanation for this fact in the rural nature of American society or in the generation's attraction to a natural or rational, as opposed to a revealed, religion, the low level of church membership is a sobering fact. Compare, for instance, that figure with present church membership, which is well over sixty percent. Although such statistics should check hasty generalizations about religion in the nation's formative period, they tend to obscure the important Protestant influence upon the nation. From the Puritan concept of God's chosen people embarking upon a mission to build a Heavenly City in the New World, to the eager identification of many religious leaders with the Revolutionary cause, up to the present, the nation has been viewed in missionary terms. Whether such a perspective is helpful or harmful today is another question. What is important is that its evolution and longevity cannot be ignored.

Protestantism synthesized, from diverse sources, a view of man that it endowed with a religious mission. Man was a dignified creation, an individual worthy of respect, who must be educated to read God's word and do His bidding in the world. So thrust out into the secular world, Protestant man succeeded, but at a cost that some critics would argue was great indeed. Let me explain.

As a starting point, we must acknowledge that **religiously motivated people throughout American history have sought to influence public policy, and they have often succeeded.** However, such efforts reveal two different approaches. The first seeks to recognize and strengthen the body, mind and will of man, and the second seeks the salvation of his soul. The first wants to emancipate man so that, in part, he can freely choose to follow his God; the second wants to take charge of man's soul, even if it means imposing upon him practices and ideas he resists.

Illustrations of both approaches abound in American history. As an example of the first approach, we can cite, in the latter nineteenth century and early twentieth century, the preaching of the Social Gospel which tapped the energy of believers to make the society more humane and its people more able to superintend their own interests. The voter registration campaign led by Jesse Jackson, which has often operated from churches and been infused with a religious spirit, is also in this tradition. The second approach can be seen historically in the very successful movement for Sunday-closing laws and in the enactment of a constitutional amendment prohibiting the manufacture and sale of alcoholic beverages.

Despite such limited success, those individuals and groups dedicated to saving man's soul were uncomfortable with the secular society that religiously motivated men had helped produce. The fight for man's soul was in danger of being lost: seeking the City of God, their brethren, intent upon stressing man's dignity, had brought forth the City of Man. Their reaction fueled attempts to obtain from the profane society further recognition, even if only symbolic, of the sacred. Again, there are many examples, including the campaign that succeeded after the Civil War in placing upon the coins of the United States an acknowledgement of the nation's faith in God.

It is this continuing campaign that lies at the heart of the present controversy over the proper relationship between religion and government. Riding to victory in 1980 on promises to restore traditional American values, Ronald Reagan welcomed the sup-

port of religious groups. Their theological predispositions had led them to believe that traditional religion was being displaced by secular humanism promoted by Supreme Court rulings. Of course, the major focal point was the Court's decision in 1962 that officially-sponsored school prayer was a violation of the First Amendment. But just how much could such groups count upon the President? Tradition was against them, for American Presidents, despite their eagerness to enlist God in the service of the country during times of crisis, had refused to make the goals of religious groups matters of national policy. President Reagan, however, was to be an exception. He put his administration behind a school prayer amendment and a bill to allow student religious groups access to school property outside of the normal class day. After initial defeat, the equal access bill became law; the fight for a school prayer amendment continues.

The social division that lies behind the school amendment proposal is deep indeed, so deep in fact that real communication is impeded if not made impossible. What to one side is profound truth, the other dismisses as meaningless rhetoric. If the two sides are not really communicating with each other, is there any hope for a useful dialogue? Perhaps there is a starting point, for all participants in the conflict, including the Supreme Court, summon history to their cause. The facts selected may differ, but they share the common assumption that an understanding of the past is crucial. It is to this common ground that the subsequent sections of this booklet are directed, in the hope that, as its readers encounter the complexities of our history, they may find ways to begin a dialogue that is long overdue.

The sections that follow are grouped into two parts: "The Philosophical and Historical Background," and "The Legal Experience." Such designations may initially be misleading, for there is as much historical material in the second part as in the first, and there is as much philosophical material in the second part as there is legal material in the first part. Since the documents in the second part consist exclusively of excerpts from Supreme Court cases, the designation "The Legal Experience" was used.

Because so much of the secondary material in the area is biased or unhelpful, we have included only primary documents, the stuff from which history is fashioned. Each one of the eight chapters is directed to a precise issue and is meant to be self-contained: it can be read, understood and discussed without any reference to other material in the booklet. Although the materials and issues presented are highly selective, it is hoped that the range of material presented will be some compensation.

NOTES

[1]Interview by Tom Minehart with Sam J. Ervin, *Durham Morning Herald*, September 23, 1984, p. 1B. For a more coordinated presentation of Ervin's views on the school prayer issue, see the excerpt from a recent article by Ervin reprinted in *Raleigh News & Observer*, September 30, 1984, p. 5D.

[2]Ibid.

[3]*Congressional Record–Senate*, March 5, 1984, Vol. 130, pp. 2303-04.

[4]George Dargo, *Roots of the Republic: A New Perspective on Early American Constitutionalism* (New York: Praeger, 1974), p. 89.

Part I

The Historical and Philosophical Background

Historians, by nature, are notorious for pushing the background of their subject beyond the point of their readers' interest. To try to avoid this common failing, we will not discuss how in primitive religions there was no distinction between the religious and the secular, nor will we discuss the rise of Christianity from its start as a persecuted religion within the Roman Empire to its dominance in medieval Europe.

Instead, we will begin with the Reformation. Reformers, such as Luther and Calvin, challenged the universal Christian Church and rent it asunder. Just the first of many religious revivals, the Protestant movement was designed to purify Christ's church. It swept away the elaborate trappings of the Church, made the Bible the centerpiece of religious authority, and concluded that man was justified by faith alone. Although the reformers were interested in bringing man closer to God, the movement had implications that could not be controlled by those who began it. For one thing, new Protestants needed to be able to read to find their way to God. With the invention of moveable type in the fifteenth century, printed books had become available. Luther himself translated the Bible into German. The Bible, however, provided little of the unity of the institutional Church, and soon Protestantism was characterized by a bewildering variety of sects. This fact did not lead to toleration among Protestant groups, for most believers considered religion too important a matter to be a subject of toleration. Since the prevailing belief was that a state could only countenance one religion, dissenters from the prescribed orthodoxy were persecuted. But seeds were planted, and it was not difficult to anticipate a situation where conditions would exist to make government persecution both unwise and counterproductive.

Such a lead-in might suggest that there is some truth to the story that as religious dissenters fled from persecution in England they arrived in the new world of the American colonies with a predisposition to accord dissenters the very freedom that they themselves had earlier been denied. Sadly, this was not the case. Yes, some men were ahead of their time, but it would take well over two centuries, from the date of the first migration, for religious freedom to become a fully operative part of the American creed.

American settlement was a haphazard enterprise, only loosely united under the English crown. Some colonies, such as Virginia and Massachusetts Bay, were the products of charters granted to corporate bodies by the King. Other colonies, such as Maryland and Pennsylvania, were the result of proprietary grants from the King to certain individuals. And finally, royal colonies, such as Virginia after 1624 and the Carolinas after a brief proprietorship, were directly under the King's control. In the seventeenth century any talk of the American colonies as a whole is somewhat misleading, for each colony was an entity unto itself.

Nowhere can we see this observation better validated than in the area of religion. No two colonies had the same religious complexion. Although the Church of England was the established church in the royal colonies, the extent and effectiveness of establishment differed greatly. Massachusetts Bay began as a Puritan theocracy in which religion and government were fused. The intolerance of Puritans led to the banishment of Roger Williams, among others. It was Williams who rattled the Puritan establishment by insisting that the garden of the church had to be walled in to protect itself from the wilderness of the state. Rhode Island became an oasis of toleration for many. Even Roman Catholics and Quakers found some haven within the seaboard colonies when Lord Baltimore received a royal grant and founded Maryland and when William Penn also tapped royal favor and founded Pennsylvania. Lord Baltimore was less successful in providing a haven for Roman Catholics than William Penn was in providing one for Quakers, but both men, by conviction and necessity, were spokesmen for free religious choice. The Maryland Toleration Act of 1649 included the first introduction of a protection for the free exercise of religion, an obvious attempt to go beyond belief to the protection of a degree of action based upon that belief. In 1692 proprietary failures brought royal control and the establishment of the Church of England. William Penn's experiment, however, continued, and of all colonies, Pennsylvania took the lead as the beacon of religious liberty, even to the extent of tolerating Roman Catholics.

Beyond Penn's flourishing experiment and Williams' and his Baptist successors' insistence on the need to separate the church from the state, there were other factors working toward toleration. For instance, when authorities in the Dutch colony of New Netherland embarked upon a program of persecuting dissenters, they were censured by the home government. The local governors were told that such action was bad for business. A similar economic concern was responsible for Parliament's action in 1740 confer-

ring the rights of English citizenship upon Jews and Quakers in the American colonies. Such motivations for a policy of religious toleration have been pronounced unworthy by those who would prefer to see the cause furthered by principled motivation. But the story would be incomplete without a realization that the cause of religious toleration was furthered by complex motives. In fact, one observer has concluded that religious liberty was an inevitable product of the geographical spaciousness that characterized the land occupied by the American colonists.

Citing such colonial developments that seem to have a tendency towards religious toleration should not, however, blind us to the way in which Christianity or Protestantism, as larger entities, infused the colonial experience and gave meaning to it. Although the Puritans were confined within New England and although their theocracy could not survive in the open spaces of the new world, their ideas permeated the entire religious and political environment by the time of the Revolution. The idea that a church could be formed by believers entering into a covenant with God was translated into the civil realm in documents such as the Mayflower Compact. And despite the Protestant emphasis upon the New Testament, the Puritans picked up the Old Testament references to God's chosen people and so read their own history. This new land with its abundant resources had been made available by God, and His chosen people would have to account to Him for their actions.

Admittedly, a number of American political leaders in the latter half of the eighteenth century were influenced by the Age of Reason and found the natural religion of deism with its impersonal but benevolent creator god appealing, but to view the quest for religious liberty as fueled only by growing indifference to revealed religion would be in error.

As indicated, the American revolutionary era was spurred by religious zeal, but it also provided the opportunity to determine anew the desirable relationship between religion and government. By the end of the eighteenth century, only two New England states, Massachusetts and Connecticut, maintained some establishment of religion.

The latter quarter of the eighteenth century is a seminal period in the story of religion and government in the United States; for that reason many readings in this section deal with these important years. But the readings also go back to the seventeenth century and into the twentieth, as they attempt to focus on some of the significant themes in our inquiry.

Coordinated studies of religion and government in the United States are available (some can be found in the **Suggestions for Additional Reading**). Our approach here, however, is to select basic areas for exploration that highlight important historical and philosophical matters.

Chapter One explores a theme that should now be familiar, the way in which the American nation has been viewed as God's chosen country. The purpose here, as in all of the chapters, is to provide some basis not only for understanding but for analysis as well.

Chapter Two looks at seventeenth-century views on the proper relationship between religion and government, where the focus is primarily on the effects of that relationship for both government and religion. Although the readings, at times, talk of a freedom of conscience, the focus is more on arguments that delineate the obligations man owes to religion and government and what they owe to him.

Although ideas, the core material of philosophy, are prevalent throughout all the sections, the third chapter concentrates on some of the basic arguments for religious freedom within a framework of respect for man's dignity. Beginning with man as a contracting party establishing a government to preserve his basic rights, the section looks not only at ideas but how they affected institutions as well. In moving beyond the eighteenth century, the readings include further justifications of religious liberty that may commend themselves more readily to the modern mind.

Chapter Four deals with the addition of the First Amendment, with its religion clauses, to the Constitution. It provides the [b]oard to Part II, which investigates both how and why the First Amendment became the foundation for subsequent [ ]f the proper relationship between religion and government within the United States.

Chapter One

God's Country: Perception or Presumption?

The Puritans who left England to settle in the newly-chartered colony of Massachusetts Bay were sure of their mission—the founding of a new Israel. Although the Puritan theocracy could not long survive in the New World, the sense of religious mission did. It survived not only in New England but throughout the American colonies and became an article of faith that transcended sectarian boundaries. Ministers who had found it easy to transfer their talent for interpreting the fundamental principles of the Bible to interpreting the fundamental law in behalf of the American revolutionary cause were now furthering both the secular cause of independence and God's work as well. The people of the new nation, founded in the late eighteenth century, would continue to view themselves and their history through this religious lens. Their leaders would consistently pay homage to God and ask His blessing for the nation. Such references were purged of sectarian content, but they seem to strike a responsive chord in the people.

On board the *Arabella* on its way to the New World, John Winthrop, who would become the first governor of the colony, preached a sermon that explained the covenant the Puritans had with God and His special mission for them (Reading 1). The second selection from Winthrop is a defense of his governing powers against a claim of the people's liberty (Reading 2). Illustrative of how matters in New England changed is John Wise's argument for democracy both in secular and church government (Reading 3).

Ministers were quick to explain the success of the American Revolution in theological terms and look forward to a glorious future under God's care. Ezra Stiles, a Congregational minister and president of Yale, preached an election sermon that illustrated this interpretation of the country's recent history (Reading 4).

That the concept of the United States as the new Israel was still flourishing is attested to by the letter a Hebrew Congregation addressed to President George Washington (Reading 5). Washington endeared himself to many religious adherents of differing faiths by his frequent public appeals to God (Reading 6). This tradition, begun by our first President, has continued; in inaugural addresses especially, it has become customary to summon God to attend to the affairs of the American nation. There is no more eloquent illustration than Abraham Lincoln's second inaugural address (Reading 7). Even John F. Kennedy, who sought to downplay his Roman Catholicism, had no hesitation in drawing upon the precedent of paying tribute to God (Reading 8).

This chapter concludes with an extract from Josiah Strong's *Our Country*, in which the Ohio clergyman calls upon America's leaders to seize the opportunity and Christianize the world (Reading 9).

Such selections could be multiplied and even carried to the present day, but the ones presented should provide a basis for contending with the question posed in the title to this chapter.

Reading 1: John Winthrop

"A Model of Christian Charity," 1630

1.... We are a Company professing ourselves fellow members of Christ, in which respect only though we were absent from each other many miles, and had our employments as far distant, yet we ought to account ourselves knit together by this bond of love, and live in the exercise of it....

2. For the work we have in hand, it is by a mutual consent through a special overruling providence, and a more than an ordinary approbation of the Churches of Christ to seek out a place of Cohabitation and Consortship under a due form of Government both civil and ecclesiastical. In such cases as this the care of the public must oversway all private respects, by which not only conscience, but mere Civil policy doth bind us; for it is a true rule that particular estates cannot subsist in the ruin of the public.

3. The end is to improve our lives to do more service to the Lord the comfort and increase of the body of Christ whereof we are members that ourselves and posterity may be the better preserved from the common corruptions of this evil

world to serve the Lord and work out our Salvation under the power and purity of his holy Ordinances.

4. For the means whereby this must be effected, they are twofold, a Conformity with the work and end we aim at, these we see are extraordinary, therefore we must not content ourselves with usual ordinary means whatsoever we did or ought to have done when we lived in England, the same must we do and more also where we go: That which the most in their Churches maintain as a truth in profession only, we must bring into familiar and constant practice, as in this duty of love we must love brotherly without dissimulation, we must love one another with a pure heart fervently we must bear one anothers burdens, we must not look only on our own things, but also on the things of our brethren, neither must we think that the Lord will bear with such failings at our hands as he doth from those among whom we have lived, and that for three reasons.

1. In regard of the more near bond of marriage, between him and us, wherein he hath taken us to be his after a most strict and peculiar manner which will make him the more Jealous of our love and obedience so he tells the people of Israel, you only have I known of all the families of the Earth therefore will I punish you for your Transgressions.

2. Because the Lord will be sanctified in them that come near him. We know that there were many that corrupted the service of the Lord, some setting up Altars before his own, others offering both strange fire and strange Sacrifices also; yet there come no fire from heaven, or other sudden Judgment upon them as did upon Nadab and Abihu who yet we may think did not sin presumptuously.

3. When God gives a special Commission he looks to have it strictly observed in every Article, when he gave Saul a Commission to destroy Amaleck he indented with him upon certain Articles and because he failed in one of the least, and that upon a fair pretence, it lost him the kingdom, which should have been his reward, if he had observed his Commission: Thus stands the cause between God and us, we are entered into Covenant with him for this work, we have taken out a Commission, the Lord hath given us leave to draw our own Articles we have professed to enterprise these Actions upon these ends, we have hereupon besought him of favor and blessing: Now if the Lord shall please to hear us, and bring us in peace to the place we desire, then hath he ratified this Covenant and sealed our Commission, [and] will expect a strict performance of the Articles contained in it, but if we shall neglect the observation of these Articles which are the ends we have propounded, and dissembling with our God, shall fall to embrace this present world and prosecute our carnal intentions, seeking great things for ourselves and our posterity, the Lord will surely break out in wrath against us be revenged of such a perjured people and make us known the price of the breach of such a Covenant.

Now the only way to avoid this shipwreck and to provide for our posterity is to follow the Counsel of Micah, to do justly, to love mercy, to walk humbly with our God, for this end, we must be knit together in this work as one man, we must entertain each other in brotherly Affection, we must be willing to abridge ourselves of our superfluities, for the supply of others necessities, we must uphold a familiar Commerce together in all meekness, gentleness, patience and liberality, we must delight in each other, make others' Conditions our own, rejoice together, mourn together, labor, and suffer together, always having before our eyes our Commission and Community in the work, our Community as members of the same body, so shall we keep the unity of the spirit in the bond of peace, the Lord will be our God and delight to dwell among us, as his own people and will command a blessing upon us in all our ways, so that we shall see much more of his wisdom power goodness and truth than formerly we have been acquainted with, we shall find that the God of Israel is among us, when ten of us shall be able to resist a thousand of our enemies, when he shall make us a praise and glory, that men shall say of succeeding plantations: the Lord make it like that of New England: for we must Consider that we shall be as a City upon a Hill, the eyes of all people are upon us; so that if we shall deal falsely with our God in this work we have undertaken and so cause him to withdraw his present help from us, we shall be made a story and a by-word through the world, we shall open the mouths of enemies to speak evil of the ways of God and all professors for Gods sake; we shall shame the faces of many of Gods worthy servants, and cause their prayers to be turned into Curses upon us till we be consumed out of the good land whither we are going: And to shut up this discourse with that exhortation of Moses, that faithful servant of the Lord, in his last farewell to Israel. *Deut. 30.* Beloved there is now set before us life, and good, death and evil in that we are Commanded this day to love the Lord our God, and to love one another to walk in his ways and to keep his Commandments and his Ordinance, and his laws, and the Articles of our Covenant with him that we may live and be multiplied, and that the Lord our God may bless us in the land whither we go to possess it: But if our hearts shall turn away so that we will not obey, but shall be seduced and worship other Gods our pleasures, and profits, and serve them; it is propounded upon us this day, we shall surely perish out of the good Land whether we pass over this vast Sea to possess it;

Therefore let us choose life,
that we, and our Seed,
may live; by obeying his
voice, and cleaveing to him,
for he is our life, and
our prosperity.

Reading 2: John Winthrop

"Defense Against Charge of Exceeding His Powers", 1645

For the other point concerning liberty, I observe a great mistake in the country about that. There is a twofold liberty, natural (I mean as our nature is now corrupt) and civil or federal. The first is common to man with beasts and other creatures. By this, man, as he stands in relation to man simply, hath liberty to do what he lists; it is a liberty to evil as well as to good. This liberty is incompatible and inconsistent with authority, and cannot endure the least restraint of the most just authority. The exercise and maintaining of this liberty makes men grow more evil, and in time to be worse than brute beasts: *omnes summus licentia deteriores* [we are all worse in liberty]. This is that great enemy of truth and peace, that wild beast, which all the ordinances of God are bent against, to restrain and subdue it. The other kind of liberty I call civil or federal, it may also be termed moral, in reference to the covenant between God and man, in the moral law, and the politic covenants and constitutions, amongst men themselves. This liberty is the proper end and object of authority, and cannot subsist without it; and it is a liberty to that only which is good, just, and honest. This liberty you are to stand for, with the hazard (not only of your goods, but) of your lives, if need be. Whatsoever crosseth this, is not authority, but a distemper thereof. This liberty is maintained and exercised in a way of subjection to authority; it is of the same kind of liberty wherewith Christ hath made us free. The woman's own choice makes such a man her husband; yet being so chosen, he is her lord, and she is subject to him, yet in a way of liberty, not of bondage; and a true wife accounts her subjection her honor and freedom, and would not think her condition safe and free, but in her subjection to her husband's authority. Such is the liberty of the church under the authority of Christ, her king and husband; his yoke is so easy and sweet to her as a bride's ornaments; and if through forwardness or wantonness, etc., she shake it off, at any time, she is at no rest in her spirit, until she takes it up again; and whether her Lord smiles upon her, and embraces her in his arms, or whether he frowns, or rebukes, or smites her, she apprehends the sweetness of his love in all, and is refreshed, supported, and instructed by every such dispensation of his authority over her. On the other side, ye know who they are that complain of this yoke and say, let us break their bands, etc., we will not have this man to rule over us. Even so, brethren, it will be between you and your magistrates. If you stand for your natural corrupt liberties, and will do what is good in your own eyes, you will not endure the least weight of authority; but will murmur, and oppose, and be always striving to shake off that yoke; but if you will be satisfied to enjoy such civil and lawful liberties, such as Christ allows you, then will you quietly and cheerfully submit unto that authority which is set over you, in all the administrations of it, for your good. Wherein, if we fail at any time, we hope we shall be willing (by God's assistance) to hearken to good advice from any of you, or in any other way of God; so shall your liberties be preserved, in upholding the honor and power of authority amongst you.

Reading 3: John Wise

***A Vindication of the Government of New-England Churches,* 1717**

The first human subject and origin of civil power is the people; for as they have a power every man over himself in a natural state, so upon a combination they can and do bequeath this power unto others and settle it according as their united discretion shall determine; for that this is very plain, that when the subject of sovereign power is quite extinct, that power returns to the people again. And, when they are free, they may set up what species of government they please; or, if they rather incline to it, they may subside into a state of natural being if it be plainly for the best....

The formal reason of government is the will of a community, yielded up and surrendered to some other subject, either of one particular person, or more, conveyed in the following manner:

Let us conceive in our mind a multitude of men, all naturally free and equal, going about voluntarily to erect themselves into a new commonwealth. Now their condition being such, to bring themselves into a political body, they must needs enter into diverse covenants.

(1) They must interchangeably each man covenant to join in one lasting society, that they may be capable to concert the measures of their safety by a public vote.

(2) A vote or decree must then nextly pass to set up some particular species of government over them. And if they are joined in their first compact upon absolute terms to stand to the decision of the first vote concerning the species of government, then all are bound by the majority to acquiesce in that particular form thereby settled, though their own private opinion incline them to some other model.

(3) After a decree has specified the particular form of government, then there will be need of a new covenant, whereby those on whom sovereignty is conferred engage to take care of the common peace and welfare; and the subjects, on the other hand, to yield them faithful obedience. In which covenant is included that submission and union of wills by which a state may be conceived to be but one person. So that the most proper definition of a civil state is this, viz.: A civil state is a compound moral person whose will (united by those covenants before passed) is the will of all; to the end it may use and apply the strength and riches of private persons toward maintaining the common peace, security, and well-being of all, which may be conceived as though the whole state was now become but one man, in which the aforesaid covenants may be supposed, under God's Providence, to be the Divine Fiat, pronounced by God. . . .

Where the constitution of a nation is such that the laws of the land are the measures both of the sovereign's commands and the obedience of the subjects, whereby it is provided that as the one are not to invade what by concessions and stipulations is granted to the ruler, so the other is not to deprive them of their lawful and determined rights and liberties, then the prince who strives to subvert the fundamental laws of the society is the traitor and the rebel and not the people, who endeavor to preserve and defend their own. It is very applicable to particular men in their rebellions or usurpations in church or state. . . .

It is certainly a great truth that man's original liberty, after it is resigned (yet under due restrictions), ought to be cherished in all wise governments, or otherwise, a man in making himself a subject, he alters himself from a freeman into a slave, which to do is repugnant to the law of nature. Also, the natural equality of men among men must be duly favored, in that government was never established by God or nature to give one man a prerogative to insult over another. Therefore, in a civil as well as in a natural state of being, a just equality is to be indulged so far as that every man is bound to honor every man, which is agreeable both with nature and religion (I Peter 2:17): *Honor all men.*

The end of all good government is to cultivate humanity, and promote the happiness of all and the good of every man in all his rights, his life, liberty, estate, honor, etc., without injury or abuse done to any. Then certainly it cannot easily be thought that a company of men that shall enter into a voluntary compact to hold all power in their own hands, thereby to use and improve their united force, wisdom, riches, and strength for the common and particular good of every member, as is the nature of a democracy; I say it cannot be that this sort of constitution will so readily furnish those in government with an appetite or disposition to prey upon each other or embezzle the common stock, as some particular persons may be apt to do when set off and entrusted with the same power.

And, moreover, this appears very natural that, when the aforesaid government or power, settled in all, when they have elected certain capable persons to minister in their affairs, and the said ministers remain accountable to the assembly, these officers must needs be under the influence of many wise cautions from their own thoughts (as well as under confinement by their commission) in their whole administration. And from thence it must needs follow that they will be more apt and inclined to steer right for the main point, viz., the peculiar good and benefit of the whole and every particular member fairly and sincerely.

And why may not these stand for very rational pleas in church order? For certainly, if Christ has settled any form of power in His church, He has done it for His church's safety and for the benefit of every member. Then He must needs be presumed to have made choice of that government as should least expose His people to hazard, either from the fraud or arbitrary measures of particular men. And it is as plain as daylight, there is no species of government like a democracy to attain this end. . . .

If the government of the gospel churches be a democracy, these consequences must necessarily follow:

1. That the right of convoking councils ecclesiastical is in the churches.

2. That such a council has only consultative not a juridical power in it. A juridical power committed to such a representative body is both needless and also dangerous to the distinct and perfect states they derive from. Complete states settled upon a body of immutable and imperial laws as its basis may want council; but to create a new subject of juridical power is some way to endanger the being of the creators.

3. That all the members of an ecclesiastical council deriving from a democracy are subjects of equal power. Whatever the power is, the several delegates must, from the nature of the government they derive from, be equal sharers in it. Democratic states, in their representative body, can make but one house, because they have but one subject of supreme power in their nature, and, therefore, their delegates, let them be who or what they may be, are under equal trust; so that none can justly claim superiority over their fellows or pretend to a higher power in their suffrage.

Indeed, in such kingdoms where the sovereign power is distributed and settled in diverse subjects that the balance of power may be more even, for the safety of the whole and of all parts under all acts of sovereign power, from such a settlement of power there arises several distinct states in the same government, which, when convened as one subject of sovereign power, they make different houses in their grand sessions. And so one house or state can negative another.

But in every distinct house of these states, the members are equal in their vote—the most ayes make the affirmative vote, and the most noes, the negative. They don't weigh the intellectual furniture, or other distinguishing qualifications of the several voters, in the scales of the golden rule of fellowship; they only add up the ayes and the noes, and so determine the suffrage of the house....

In the last century, God has been very admirable in the works of Providence, and has therein highly dignified our constitution. And we want no other evidence ... than the recognition of what God has done for these famous English colonies in North America, who have all along distinguished themselves from all the world by their singular regard, both to the faith and practice of the true religion. Now, let any other constitution on earth but parallel ours in the eminent shines of Providence and in religious effects and we will resign the whole cause. But [until] then, we will go on and rejoice in the Grace of God that we, in these countries, are by His good Providence over us the subjects of the most ancient, rational, and noble constitution in church order that ever was, will be, or can be, while the laws of nature and grace remain unrepealed. For that it is a constitution which infinite wisdom has authorized and founded in the law of nature, and His omnificent Providence has eminently honored and dignified, both by the smiles and frowns of His countenance, through all the ages of the Christian world, to this very morning.

And though some of the reverend churches within this grand consociation (who settled upon the same platform with us) have with too great a precipitation made a defection from the constitution, yet this is our comfort—that their alteration is not so firm as the laws of the Medes and Persians; for that those who turned them off may by the same power bring them on to their old basis again. And let Christ pity and help them; for certainly their present state is portentous, from what may be observed from the proceedings of Providence through the whole Christian Era, unto this day.

Reading 4: Ezra Stiles

"The United States Elevated to Glory and Honor...," 1783

However it may be doubted whether ... the prosperity and decline of other empires have corresponded with their moral state as to virtue and vice, yet the history of the Hebrew theocracy shows that the secular welfare of God's ancient people depended upon their virtue, their religion, their observance of that holy covenant which Israel entered into with God on the plains at the foot of Nebo on the other side [of] Jordan. Here Moses, the man of God, assembled three million of people (the number of the United States), recapitulated and gave them a second publication of the sacred jural institute delivered thirty-eight years before with the most awful solemnity at Mount Sinai. A law dictated with sovereign authority by the Most High ... becomes of invincible force and obligation without any reference to the consent of the governed.... But in the case of Israel he condescended to a mutual covenant, and by the hand of Moses led his people to avouch the Lord Jehovah to be their God and in the most public and explicit manner voluntarily to engage and covenant with God to keep and obey his law. Thereupon this great prophet ... declared, in the name of the Lord, that the Most High ... took them for a peculiar people to himself, promising to be their God and protector, and upon their obedience to make them prosperous and happy (Deut. 29:10, 14, 30:9, 19). He foresaw, indeed, their rejection of God and predicted the judicial chastisement of apostasy.... But, as well to comfort and support the righteous in every age and under every calamity as to make his power known among all nations, God determined that a remnant should be saved. Whence Moses and the prophets, by divine direction, interspersed their writings with promises that when the ends of God's moral government should be answered ..., he would, by his irresistible power and sovereign grace, subdue the hearts of his people to a free, willing, joyful obedience.... Then the words of Moses, hitherto accomplished but in part, will be literally fulfilled when this branch of the posterity of Abraham shall be nationally collected and become a very distinguished and glorious people under the great messiah, the Prince of Peace. He will then "make them high above all nations which he hath made in praise, and in name, and in honor, and they shall become a holy people unto the Lord their God" [Deut. 26:19].

I shall enlarge no further upon the primary sense and literal accomplishment of this and other prophecies respecting both Jews and Gentiles in the latter-day glory of the church, for I have assumed the text only as introductory to a discourse upon the political welfare of God's American Israel and as allu-

sively prophetic of the future prosperity and splendor of the United States. We may then consider ... what reason we have to expect that, by the blessing of God, these states may prosper and flourish into a great American republic and ascend into high and distinguished honor among the nations of the earth. "To make thee high above all nations which he hath made in praise, and in name, and in honor."

Heaven hath provided this country, not indeed derelict but only partially settled, and consequently open for the reception of a new enlargement of Japheth. Europe was settled by Japheth. America is settling from Europe. And perhaps this second enlargement bids fair to surpass the first.... Already for ages has Europe arrived to a plenary, if not declining, population of one hundred millions. In two or three hundred years this second enlargement may cover America with three times that number if the present increase continues with the enterprising spirit of Americans for colonization and removing out into the wilderness and settling new countries.... Can we contemplate their present and anticipate their future increase and not be struck with astonishment to find ourselves in the midst of the fulfilment of the prophecy of Noah? May we not see that we are the object which the Holy Ghost had in view four thousand years ago when he inspired the venerable patriarch with the visions respecting his posterity? While the principal increase was first in Europe westward from Scythia (the residence of the family of Japheth), a branch of the original enlargement extending eastward into Asia and spreading round to the southward of the Caspian became the ancient kingdoms of Media and Persia.... And now the other part of the prophecy is fulfilling in a new enlargement....

The population of this land will probably become very great and Japheth become more numerous millions in America than in Europe and Asia, and the two or three millions of the United States may equal the population of the oriental empires which far surpasses that of Europe....

But a multitude of people, even the two hundred million of the Chinese empire, cannot subsist without civil government. All the forms of civil polity have been tried by mankind except one, and that seems to have been reserved in providence to be realized in America. Most of the states of all ages in their originals, both as to policy and property, have been founded in rapacity, usurpation, and injustice, so that in the contests recorded in history the public right is a dubious question, it being rather certain that it belongs to neither of the contending parties.... All original right is confounded and lost. We can only say that there still remains in the body of the people at large, the body of mankind of any and every generation, a power (with which they are invested by the Author of their being) to wrest government out of the hands of reigning tyrants and originate new policies [forms of government] adapted to the conservation of liberty and promoting general welfare.

But what is the happiest form of civil government is the great question. Almost all the polities may be reduced to hereditary dominion in either a monarchy or aristocracy, and these supported by a standing army.... True liberty is preserved in the Belgic and Helvetic republics, and among the nobles in the elective monarchy of Poland. For the rest of the world, the civil dominion, though often wisely administered, is so modeled as to be beyond the control of those for whose end God instituted government. But a democratical polity for millions standing upon the broad basis of the people at large, amply charged with property, has not hitherto been exhibited....

A well-ordered democratical aristocracy, standing upon the annual election of the people and revocable at pleasure, is the polity which combines the United States. And from the nature of man and the comparison of ages, I believe it will approve itself the most equitable, liberal, and perfect.... By the annual appeals to the public, a power is reserved to the people to remedy any corruptions or errors in government. And even if the people should sometimes err, yet each assembly of the states and the body of the people always embosom wisdom sufficient to correct themselves so that a political mischief cannot be durable. Herein we far surpass any states on earth. We can correct ourselves if in the wrong....

Already does the new constellation of the United States begin to realize this glory.... And we have reason to hope and, I believe, to expect that God has still greater blessings in store for this vine which his own right hand hath planted to make us "high among the nations in praise, and in name, and in honor." The reasons are numerous, weighty, and conclusive....

Liberty, civil and religious, has sweet and attractive charms. The enjoyment of this, with property, has filled the English settlers in America with a most amazing [illegible] which has operated, and still will operate, with great en[illegible] Never before has the experiment been so effectually tried of every man's reaping the fruits of his labor and feeling his share in the aggregate system of power....

Our degree of population is such as to give us reason to expect that this will become a great people. It is probable that within a century of our independence the sun will shine on fifty millions of inhabitants in the United States. This will be a great, a very great nation, nearly equal to half Europe.... An accelerated multiplication will attend our general propagation and overspread the whole territory westward for ages, so that before the millennium the English settlements in America may become more numerous millions than that greatest dominion on earth, the Chinese empire....

I am sensible some will consider these as visionary, utopian ideas. And so they would have judged had they lived in the apostolic age and been told that by the time of

Constantine the [Roman] empire would become Christian. As visionary that the twenty thousand souls which first settled New England should be multiplied to near a million in a century and a half.... As utopian would it have been to the loyalists at the battle of Lexington that in less than eight years the independence and sovereignty of the United States should be acknowledged.... How wonderful revolutions, the events of Providence! We live in an age of wonders. We have lived an age in a few years. We have seen more wonders accomplished in eight years than are usually unfolded in a century.

God be thanked that we have lived to see peace restored to this bleeding land.... Does it not become us to reflect how wonderful, how gracious, how glorious has been the good hand of our God upon us in carrying us through so tremendous a warfare? We have sustained a force brought against us which might have made any empire on earth to tremble. And yet ... having obtained the help of God, we continue unto this day. Forced unto the last solemn appeal, America watched for the first blood. This was shed by Britons on the nineteenth of April, 1775, which instantly sprung an army of twenty thousand into spontaneous existence.... Whereupon Congress put at the head of this spirited army the only man on whom the eyes of all Israel were placed. Posterity, I apprehend, and the world itself, inconsiderate, and incredulous as they may be of the dominion of Heaven, will yet do so much justice to the divine moral government as to acknowledge that this American Joshua was raised up by God ... for the great work of leading the armies of this American Joseph (now separated from his brethren) and conducting this people through the severe, the arduous conflict, to liberty and independence....

Great and extensive will be the happy effects of this warfare in which we have been called to fight out, not the liberties of America only, but the liberties of the world itself. The spirited and successful stand which we have made against tyranny will prove the salvation of England and Ireland. And by teaching all sovereigns the danger of irritating and trifling with the affections and loyalty of their subjects, introduce clemency, moderation, and justice into public government at large through Europe....

This great American Revolution ... will be attended to and contemplated by all nations. Navigation will carry the American flag around the globe itself, and display the thirteen stripes and new constellation at Bengal and Canton, on the Indus and Ganges, on the Whang-ho and the Yang-tse-kiang, and with commerce will import the wisdom and literature of the East. That prophecy of Daniel is now literally fulfilling: there shall be a universal traveling "to and fro, and knowledge shall be increased" [Dan. 12:4]. This knowledge will be brought home and treasured up in America, and being here digested and carried to the highest perfection may reblaze back from America to Europe, Asia, and Africa and illumine the world with truth and liberty....

Little would civilians have thought ages ago that the world should ever look to America for models of government and polity. Little did they think of finding this most perfect polity among the poor outcasts, the contemptible people of New England, and particularly in the long despised civil polity of Connecticut—a polity conceived by the sagacity and wisdom of a Winthrop, a Ludlow, Haynes, Hopkins, Hooker, and the other first settlers of Hartford in 1636.

And while Europe and Asia may hereafter learn that the most liberal principles of law and civil polity are to be found on this side of the Atlantic, they may also find the true religion here depurated [purified] from the rust and corruption of the ages, and learn from us to reform and restore the church to its primitive purity.... Here will be no bloody tribunals ... forcibly to control the understanding and put out the light of reason, the candle of the Lord, in man.... Religion may here receive its last, most liberal, and impartial examination. Religious liberty is peculiarly friendly to fair and generous disquisition. Here Deism will have its full chance. Nor need libertines more to complain of being overcome by any weapons but the gentle, powerful ones of argument and truth. Revelation will be found to stand the test to the ten-thousandth examination....

In this country (out of sight of mitres and the purple, and removed from systems of corruption confirmed for ages and supported by the spiritual janizaries of an ecclesiastical hierarchy aided and armed by the secular power) religion may be examined with the noble Berean freedom [Acts 17:11], the freedom of American-born minds.... Great things are to be effected in the world before the millennium ..., and perhaps the liberal and candid disquisitions in America are to be rendered extensively subservient to some of the most glorious designs of Providence, and particularly in the propagation and diffusion of religion through the earth, in filling the whole earth with the knowledge of the glory of the Lord. A time will come when six hundred millions of the human race shall be ready to drop their idolatry and all false religion.... And when God in his providence shall convert the world, ... should American missionaries be blessed to succeed in the work of Christianizing the heathen in which the Romanists and foreign Protestants have very much failed, it would be an unexpected wonder and a great honor to the United States. And thus the American republic, by illuminating the world with truth and liberty, would be exalted and made "high among the nations in praise, and in name, and in honor." I doubt not this is the honor reserved for us....

Reading 5: Letter to George Washington from Hebrew Congregation in Newport, August 17, 1790

Sir:

Permit the children of the stock of Abraham to approach you with the most cordial affection and esteem for your personal merits, and to join with our fellow citizens in welcoming you to Newport.

With pleasure we reflect on those days, those days of difficulty and dangers, when the God of Israel who delivered David from the peril of the sword shielded your head in the day of battle. And we rejoice to think that the same Spirit who rested in the bosom of the greatly beloved Daniel, enabling him to preside over the provinces of the Babylonish empire, rests and ever will rest upon you, enabling you to discharge the arduous duties of chief magistrate in these states.

Deprived as we heretofore have been of the invaluable rights of free citizens, we now with a deep sense of gratitude to the Almighty Disposer of All Events behold a government erected by the majesty of the people, a government which to bigotry gives no sanction, to persecution no assistance, but generously affording to all liberty of conscience and immunities of citizenship; deeming everyone, of whatever nation, tongue, or language, equal parts of the great governmental machine. This so ample and extensive federal union, whose basis is philanthropy, mutual confidence, and public virtue, we cannot but acknowledge to be the work of the great God who ruleth in the armies of heaven and among the inhabitants of the earth, doing whatsoever seemeth him good.

For all the blessings of civil and religious liberty which we enjoy under an equal and benign administration, we desire to send up our thanks to the Ancient of Days, the great preserver of men, beseeching him that the angel who conducted our forefathers through the wilderness into the promised land may graciously conduct you through all the difficulties and dangers of this mortal life. And when, like Joshua full of days and full of honor, you are gathered to your fathers may you be admitted into the heavenly paradise to partake of the water of life and the tree of immortality.

Done and signed by order of the Hebrew Congregation in Newport, Rhode Island, August 17, 1790.

MOSES SEIXAS

Reading 6: Washington's First Inaugural Address, 1789

. . . It would be peculiarly improper to omit in this first official act my fervent supplications to that Almighty Being who rules over the universe, who presides in the councils of nations, and whose providential aids can supply every human defect, that His benediction may consecrate to the liberties and happiness of the people of the United States a Government instituted by themselves for these essential purposes, and may enable every instrument employed in its administration to execute with success the functions allotted to his charge. . . . No people can be bound to acknowledge and adore the Invisible Hand which conducts the affairs of men more than those of the United States. Every step by which they have advanced to the character of an independent nation seems to have been distinguished by some token of providential agency; and in the important revolution just accomplished in the system of their united government the tranquil deliverations and voluntary consent of so many distinct communities from which the event has resulted can not be compared with the means by which most governments have been established without some return of pious gratitude, along with an humble anticipation of the future blessings which the past seem to presage. . . .

By the article establishing the executive department it is made the duty of the President "to recommend to your consideration such measures as he shall judge necessary and expedient." The circumstances under which I now meet you will acquit me from entering into that subject further than to refer to the great constitutional charter under which you are assembled, and which, in defining your powers, designates the objects to which your attention is to be given. It will be more consistent with those circumstances, and far more congenial with the feelings which actuate me, to substitute, in place of a recommendation of particular measures, the tribute that is due to the talents, the rectitude, and the patriotism which adorn the characters selected to devise and adopt them. In these honorable qualifications I behold the surest pledges that as on one side no local prejudices or attachments, no separate views nor party animosities, will misdirect the comprehensive and equal eye which ought to watch over this great assemblage of communities and interests, so, on another, that the foundation of our national policy will be laid in the pure and immutable principles of private morality, and the preeminence of free government be exemplified by all the attributes which can win the affections of its citizens and command the respect

of the world. I dwell on this prospect with every satisfaction which an ardent love for my country can inspire, since there is no truth more thoroughly established than that there exists in the economy and course of nature an indissoluble union between virtue and happiness; between duty and advantage; between the genuine maxims of an honest and magnanimous policy and the solid rewards of public prosperity and felicity; since we ought to be no less persuaded that the propitious smiles of Heaven can never be expected on a nation that disregards the eternal rules of order and right which Heaven itself has ordained; and since the preservation of the sacred fire of liberty and the destiny of the republican model of government are justly considered, perhaps as **deeply,** as **finally,** staked on the experiment intrusted to the hands of the American people.

Besides the ordinary subjects submitted to your care, it will remain with your judgment to decide how far an exercise of the occasional power delegated by the fifth article of the Constitution is rendered expedient at the present juncture by the nature of objections which have been urged against the system, or by the degree of inquietude, which has given birth to them....

To the foregoing observations I have one to add, which will be most properly addressed to the House of Representatives. It concerns myself, and will therefore be as brief as possible. When I was first honored with a call into the service of my country, then on the eve of an arduous struggle for its liberties, the light in which I contemplated my duty required that I should renounce every pecuniary compensation. From this resolution I have in no instance departed; and being still under the impressions which produced it, I must decline as inapplicable to myself any share in the personal emoluments which may be indispensably included in a permanent provision for the executive department, and must accordingly pray that the pecuniary estimates for the station in which I am placed may during my continuance in it be limited to such actual expenditures as the public good may be thought to require.

Having thus imparted to you my sentiments as they have been awakened by the occasion which brings us together, I shall take my present leave; but not without resorting once more to the benign Parent of the Human Race in humble supplication that, since He has been pleased to favor the American people with opportunities for deliberating in perfect tranquility, and dispositions for deciding with unparalleled unanimity on a form of government for the security of their union and the advancement of their happiness, so His divine blessing may be equally **conspicuous** in the enlarged views, the temperate consultations, and the wise measures on which the success of this Government must depend.

Reading 7: Lincoln's Second Inaugural Address, 1865

FELLOW-COUNTRYMEN:—At this second appearing to take the oath of the presidential office there is less occasion for an extended address than there was at the first. Then a statement somewhat in detail of a course to be pursued seemed fitting and proper. Now, at the expiration of four years, during which public declarations have been constantly called forth on every point and phase of the great contest which still absorbs the attention and engrosses the energies of the nation, little that is new could be presented. The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself, and it is, I trust, reasonably satisfactory and encouraging to all. With high hope for the future, no prediction in regard to it is ventured.

On the occasion corresponding to this four years ago all thoughts were anxiously directed to an impending civil war. All dreaded it, all sought to avert it. While the inaugural address was being delivered from this place, devoted altogether to **saving** the Union without war, insurgent agents were in the city seeking to **destroy** it without war—seeking to dissolve the Union and divide effects by negotiation. Both parties deprecated war, but one of them would **make** war rather than let the nation survive, and the other would **accept** war rather than let it perish, and the war came.

One eighth of the whole population was colored slaves, not distributed generally over the Union, but localized in the southern part of it. These slaves constituted a peculiar and powerful interest. All knew that this interest was somehow the cause of the war. To strengthen, perpetuate, and extend this interest was the object for which the insurgents would rend the Union even by war, while the Government claimed no right to do more than to restrict the territorial enlargement of it. Neither party expected for the war the magnitude or the duration which it has already attained. Neither anticipated that the **cause** of the conflict might cease with or even before the conflict itself should cease. Each looked for an easier triumph, and a result less fundamental and astounding. Both read the same Bible and pray to the same God, and each invokes His aid against the other. It may seem strange that any men should dare to ask a just God's assistance in wringing their bread from the sweat of other men's faces, but let us judge not, that we be not judged. The prayers of both could not be answered. That of neither has been answered fully. The Almighty has His own purposes. "Woe unto the world because of offenses; for it must needs be that offenses come, but woe to that man by whom the offense cometh." If we shall

suppose that American slavery is one of those offenses which, in the providence of God, must needs come, but which, having continued through His appointed time, He now wills to remove, and that He gives to both North and South this terrible war as the woe due to those by whom the offense came, shall we discern therein any departure from those divine attributes which the believers in a living God always ascribe to Him? Fondly do we hope, fervently do we pray, that this mighty scourge of war may speedily pass away. Yet, if God wills that it continue until all the wealth piled by the bondsman's two hundred and fifty years of unrequited toil shall be sunk, and until every drop of blood drawn with the lash shall be paid by another drawn with the sword, as was said three thousand years ago, so still it must be said, "The judgments of the Lord are true and righteous altogether."

With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in, to bind up the nation's wounds, to care for him who shall have borne the battle and for his widow and his orphan, to do all which may achieve and cherish a just and lasting peace among ourselves and with all nations.

Reading 8: Kennedy's Inaugural Address, 1961

We observe today not a victory of party but a celebration of freedom—symbolizing an end as well as a beginning—signifying renewal as well as change. For I have sworn before you and Almighty God the same solemn oath our forebearers prescribed nearly a century and three-quarters ago.

The world is very different now. For man holds in his mortal hands the power to abolish all forms of human poverty and all forms of human life. And yet the same revolutionary beliefs for which our forebearers fought are still at issue around the globe—the belief that the rights of man come not from the generosity of the state but from the hand of God.

We dare not forget today that we are the heirs of that first revolution. Let the word go forth from this time and place, to friend and foe alike, that the torch has been passed to a new generation of Americans—born in this century, tempered by war, disciplined by a hard and bitter peace, proud of our ancient heritage—and unwilling to witness or permit the slow undoing of those human rights to which this nation has always been committed, and to which we are committed today at home and around the world.

Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and the success of liberty.

This much we pledge—and more.

. . . To those nations who would make themselves our adversary, we offer not a pledge but a request: that both sides begin anew the quest for peace, before the dark powers of destruction unleashed by science engulf all humanity in planned or accidental self-destruction.

We dare not tempt them with weakness. For only when our arms are sufficient beyond doubt can we be certain beyond doubt that they will never be employed.

But neither can two great and powerful groups of nations take comfort from our present course—both sides overburdened by the cost of modern weapons, both rightly alarmed by the steady spread of the deadly atom, yet both racing to alter that uncertain balance of terror that stays the hand of mankind's final war.

So let us begin anew—remembering on both sides that civility is not a sign of weakness, and sincerity is always subject to proof. Let us never negotiate out of fear. But let us never fear to negotiate.

Let both sides explore what problems unite us instead of belaboring those problems which divide us.

Let both sides, for the first time, formulate serious and precise proposals for the inspection and control of arms—and bring the absolute power to destroy other nations under the absolute control of all nations.

Let both sides seek to invoke the wonders of science instead of its terrors. Together let us explore the stars, conquer the deserts, eradicate disease, tap the ocean depths, and encourage the arts and commerce.

Let both sides unite to heed in all corners of the earth the command of Isaiah—to "undo the heavy burdens . . . [and] let the oppressed go free."

And if a beachhead of co-operation may push back the jungle of suspicion, let both sides join in creating a new endeavor, not a new balance of power, but a new world of law, where the strong are just and the weak secure and the peace preserved.

All this will not be finished in the first one hundred days. Nor will it be finished in the first one thousand days, nor in the life of this administration, nor even perhaps in our lifetime on this planet. But let us begin.

In your hands, my fellow citizens, more than mine, will rest the final success or failure of our course. Since this country was founded, each generation of Americans has been summoned to give testimony to its national loyalty. The graves of young Americans who answered the call to service surround the globe.

Now the trumpet summons us again—not as a call to bear arms, though arms we need—not as a call to battle, though embattled we are—but a call to bear the burden of a long twilight struggle, year in and year out, "rejoicing in hope, patient in tribulation"—a struggle against the common enemies of man: tyranny, poverty, disease, and war itself.

Can we forge against these enemies a grand and global alliance, North and South, East and West, that can assure a more fruitful life for all mankind? Will you join in that historic effort?

In the long history of the world, only a few generations have been granted the role of defending freedom in its hour of maximum danger. I do not shrink from this responsibility—I welcome it. I do not believe that any of us would exchange places with any other people or any other generation. The energy, the faith, the devotion which we bring to this endeavor will light our country and all who serve it—and the glow from that fire can truly light the world.

And so, my fellow Americans: ask not what your country can do for you—ask what you can do for your country.

My fellow citizens of the world: ask not what America will do for you, but what together we can do for the freedom of man. Finally, whether you are citizens of America or citizens of the world, ask of us here the same high standards of strength and sacrifice which we ask of you. With a good conscience our only sure reward, with history the final judge of our deeds, let us go forth to lead the land we love, asking His blessing and His help, but knowing that here on earth God's work must truly be our own.

Reading 9: Josiah Strong

***Our Country: Its Possible Future and Its Present Crisis,* 1885**

Every race which has deeply impressed itself on the human family has been the representative of some great idea—one or more—which has given direction to the nation's life and form to its civilization.... The Anglo-Saxon is the representative of two great ideas which are closely related. One of them is that of civil liberty.... The other great idea of which the Anglo-Saxon is the exponent is that of a pure *spiritual* Christianity.... It was the fire of liberty burning in the Saxon heart that flamed up against the absolutism of the Pope.... But, with rare and beautiful exceptions, Protestantism on the Continent has degenerated into mere formalism. By confirmation at a certain age the state churches are filled with members who generally know nothing of a personal spiritual experience....

It is not necessary to argue to those for whom I write that the two great needs of mankind ... are, first, a pure spiritual Christianity, and, second, civil liberty. Without controversy, these are the forces which in the past have contributed most to the elevation of the human race and they must continue to be in the future the most efficient ministers to its progress. It follows then that the Anglo-Saxon as the great representative of these two ideas, the depositary of these two greatest blessings, sustains peculiar relations to the world's future, is divinely commissioned to be in a peculiar sense his brother's keeper.... Anglo-Saxons (I use the term somewhat broadly to include all English-speaking people) ... occupy lands which invite almost unlimited expansion—the United States, Canada, Australia, and South Africa. [And] ... emigration from Europe, which is certain to increase, is chiefly into [these] Anglo-Saxon countries. While these foreign elements exert a modifying influence on the Anglo-Saxon stock, their descendants are certain to be Anglo-Saxonized.... It is not unlikely that before the close of the next century this race will outnumber all the other civilized races of the world. Does it not look as if God were not only preparing in our Anglo-Saxon civilization the die with which to stamp the peoples of the earth, but as if he were also massing behind that die the mighty power with which to press it? ...

There can be no reasonable doubt that North America is to be the great home of the Anglo-Saxon, the principal seat of his power, the center of his life and influence. Not only does it constitute seven-elevenths of his possessions but this empire is unsevered, while the remaining four-elevenths are fragmentary and scattered over the earth.... Our continent has room and resources and climate. It lies in the pathway of the nations, it belongs to the zone of power, and already among Anglo-Saxons do we lead in population and wealth. Of England, Franklin once wrote: "That pretty island which, compared to America, is but a stepping-stone in a brook, scarce enough of it above water to keep one's shoes dry." ... Mr. Darwin ... says: "There is apparently much truth in the belief that the wonderful progress of the United States as well as the character of the people are the results of natural selection, for the more energetic, restless, and courageous men from all parts of Europe have emigrated during the last ten or twelve generations to that great country, and have there succeeded best." ... There is abundant reason to believe that the Anglo-Saxon race is to be ... more effective here than in the mother country. The marked superiority of this race is due in large measure to its

highly mixed origin. Says Rawlinson: "It is a general rule, now almost universally admitted by ethnologists, that the mixed races of mankind are superior to the pure ones." ... The ancient Egyptians, the Greeks, and the Romans were all mixed races. Among modern races, the most conspicuous example is afforded by Anglo-Saxons.... Mr. Tennyson's poetic line,

"Saxon and Norman and Dane are we,"

must be supplemented with Celt and Gaul, Welshman and Irishman, Frisian and Flamand, French Huguenot and German Palatine. What took place a thousand years and more in England again transpires today in the United States. "History repeats itself." But, as the wheels of history are the chariot wheels of the Almighty, there is with every revolution an onward movement toward the goal of his eternal purposes. There is here a new commingling of races. And while the largest injections of foreign blood are substantially the same elements that constituted the original Anglo-Saxon admixture so that we may infer the general type will be preserved, there are strains of other bloods being added which ... may be expected to improve the stock and aid it to a higher destiny. If the dangers of immigration ... can be successfully met ..., it may be expected to add value to the amalgam which will constitute the new Anglo-Saxon race of the New World....

It may be easily shown ... that the two great ideas of which the Anglo-Saxon is the exponent are having a fuller development in the United States than in Great Britain. There the union of church and state tends strongly to paralyze some of the members of the body of Christ. Here there is no such influence to destroy spiritual life and power. Here also has been evolved the form of government consistent with the largest possible civil liberty.... Another marked characteristic of the Anglo-Saxon is what may be called an instinct or genius for colonizing. His unequaled energy, his indomitable perseverance, and his personal independence made him a pioneer.... It was those in whom this tendency was strongest that came to America. And this inherited tendency has been further developed by the westward sweep of successive generations across the continent.... Again, nothing more manifestly distinguishes the Anglo-Saxon than his intense and persistent energy, and he is developing in the United States an energy which in eager activity and effectiveness is peculiarly American. This is due partly ... to our climate which acts as a constant stimulus.... Moreover, our social institutions are stimulating. In Europe the various ranks of society are ... fixed and fossilized.... Here ... everyone is free to become whatever he can make of himself.... Thus many causes operate to produce here the most forceful and tremendous energy in the world.

What is the significance of such facts? These tendencies unfold the future. They are the mighty alphabet with which God writes his prophecies. May we not by a careful laying together of the letters spell out something of his meaning? It seems to me that God with infinite wisdom and skill is training the Anglo-Saxon race for an hour sure to come in the world's future. Heretofore there has always been in the history of the world a comparatively unoccupied land westward into which the crowded countries of the East have poured their surplus populations. But the widening waves of migration ... meet today on our Pacific coast. There are no more new worlds. The unoccupied arable lands of the earth are limited and will soon be taken.... Then will the world enter upon a new stage of its history—*the final competition of races, for which the Anglo-Saxon is being schooled*.... Then this race of unequaled energy, with all the majesty of numbers and the might of wealth behind it—the representative, let us hope, of the largest liberty, the purest Christianity, the highest civilization—having developed peculiarly aggressive traits calculated to impress its institutions upon mankind will spread itself over the earth.... Can anyone doubt that the result of this competition of races will be the "survival of the fittest?" ... Nothing can save the inferior race but a ready and pliant assimilation.... The contest is not one of arms, but of vitality and civilization....

Some of the stronger races doubtless may be able to preserve their integrity. But in order to compete with the Anglo-Saxon, they will probably be forced to adopt his methods and instruments, his civilization and his religion. Significant movements are now in progress among them. While the Christian religion was never more vital or its hold upon the Anglo-Saxon mind stronger, there is taking place among the nations a widespread revolt against traditional beliefs.... Old superstitions are loosening their grasp. The dead crust of fossil faiths is being shattered by the movements of life underneath.... Thus, while on this continent God is training the Anglo-Saxon race for its mission, a complemental work has been in progress in the great world beyond. God has two hands. Not only is he preparing in our civilization the die with which to stamp the nations but, by what Southey called the "timing of Providence," he is preparing mankind to receive our impress.

Is there room for reasonable doubt that this race ... is destined to dispossess many weaker races, assimilate others, and mold the remainder, until in a very true and important sense it has Anglo-Saxonized mankind. Already "the English language, saturated with Christian ideas, gathering up into itself the best thought of all ages, is the great agent of Christian civilization throughout the world".... In my own mind, there is no doubt that the Anglo-Saxon is to exercise the commanding influence in the world's future, but the exact nature of that influence is as yet undetermined. [Every civilization has its destructive and preservative elements. The Anglo-Saxon race would speedily decay but for the salt of Christianity. Bring

savages into contact with our civilization and its destructive forces become operative at once, while years are necessary to render effective the saving influences of Christian instruction.] . . .

How rapidly . . . [the Anglo-Saxon] will hasten the coming of the kingdom wherein dwelleth righteousness [II Pet. 3:13] or how many ages he may retard it is still uncertain, but **it is now being swiftly determined**. . . . When Napoleon drew up his troops . . . under the shadow of the Pyramids, pointing to the latter, he said to his soldiers: "Remember that from yonder heights forty centuries look down on you." Men of this generation, from the pyramid top of opportunity on which God has set us, **we look down on forty centuries!** We stretch our hand into the future with power to mold the destinies of unborn millions. . . . I believe it is fully in the hands of the Christians of the United States during the next fifteen or twenty years to hasten or retard the coming of Christ's kingdom in the world by hundreds and perhaps thousands of years. We of this generation and nation occupy the Gibraltar of the ages which commands the world's future.

Questions for Discussion

1. Winthrop provides an explanation of what has been called covenant theology, that is, that God has made a contract with His people. Does this idea still survive today? Does this view inevitably lead to the conclusion that the people included in the contract are specially chosen by God? Finally, is this God's work or man's?

2. Compare Wise's views on religion and government with those of Winthrop. Does Wise say that God favors democracy?

3. Are you satisfied with Stiles' interpretation of American history?

4. With many disabilities placed upon them in the various states of the Union, why were the Jews so pleased with the nation under Washington's leadership?

5. Do Presidential addresses, with their references to God, speak to the question of whether the United States is a religious nation? Could you think of secular reasons for the references to God? Do you think such references are evidence for the existence of an American civil religion largely divorced from traditional religion?

6. Strong was also secretary of the American Home Missionary Society. Does this fact give you a different perspective on his views? Can we be comfortable with his ideas today?

Chapter Two

Near the Beginning: Should God's Realm Be Separated from Man's?

Even the most casual observer of American history could not ignore the fact that the desire for freedom from religious persecution fueled the settlement of the British-American colonies in the seventeenth century. Unlike France, which prevented religious dissenters from migrating to the New World, Great Britain opened the door. The result was a religious diversity in the British colonies that affected not only colonial development but the nation these colonies would form.

American settlement was a haphazard enterprise, only loosely united under the English Crown. Some colonies, such as Virginia and Massachusetts Bay, were the products of charters granted to corporate bodies by the King. Other colonies, such as Maryland and Pennsylvania, were the result of proprietary grants from the King to certain individuals. And finally, royal colonies, such as Virginia after 1624 and the Carolinas after a brief proprietorship, were directly under the King's control. In the 17th century any talk of the American colonies as a whole is somewhat misleading, for each colony was an entity unto itself.

Nowhere can we see this observation better validated than in the area of religion. No two colonies had the same religious complexion. Although the Church of England was the established church in the royal colonies, the extent and effectiveness of establishment differed greatly. Massachusetts Bay began as a Puritan theocracy in which church and state were fused. Roman Catholics and Quakers were often persecuted in the colonies, but even these groups found some haven when Lord Baltimore received a royal grant and founded Maryland and when William Penn also tapped royal favor to found Pennsylvania. Because of such religious diversity, it was early determined that there could never be a single church or a single religion in the American colonies.

This long term effect of religious diversity must not blind us to the short term battles that were waged throughout the seventeenth century. Working against a Western and British tradition of the union of Church and State, those who sought a different answer spelled out their reasons for claiming that the two institutions should not be merged. Although these reformers talked of a liberty of conscience, much of their writing was directed toward defending both religion and government from what they perceived as the evils of government enforcing religious obligations.

We begin this section with excerpts from the writing of John Cotton (Readings 10, 11, and 12), the most famous Massachusetts minister and chief spokesman for the Puritan orthodoxy. Although he was writing in response to the challenge of a wayward Roger Williams, he is placed first because of his defense of the union of religion and government.

Roger Williams was at first enthusiastically welcomed into the ministerial ranks of Massachusetts Bay Puritanism, but increasingly he alienated those who had earlier embraced him. His belief that any mixture of the temporal and religious was ungodly undercut the orthodoxy and eventually led to his banishment. In time Williams founded the colony of Rhode Island, which became a haven for Protestant dissenters. For Williams, God's garden could only be carved out of the wilderness by fencing it off from temporal affairs. His writings here (Readings 13 and 14) attack the persecution of dissenters and the union of religion and government; for him, each sphere had its rightful authority and even religious adherents had secular responsibilities.

The Maryland Toleration Act of 1649 (Reading 15) follows as an example of the limits imposed on a policy of toleration in mid-seventeenth century America.

William Penn, the Quaker founder of Pennsylvania, pushed well beyond the toleration found in the Maryland act and argued for a respect for freedom of conscience (Reading 16).

The chapter concludes with excerpts from John Locke's prolific pen on the subject of toleration as the best policy for a government to follow (Reading 17). Locke, whose ideas on government would exert such a profound influence on Americans, believed that persecution of dissenters was self-defeating.

As you read this material, you can easily see the arguments with which the writers were contending. Are their responses completely satisfying?

Reading 10: John Cotton

From *The Bloudy Tenent, Washed* (1647)

Fundamental doctrines are of two sorts. Some hold forth the foundation of Christian religion, as the doctrines of salvation by Christ and of faith in His name, repentance from dead works, resurrection from the dead, and the like. Others concern the foundation of the church, as the matter and form of it, and the proper adjuncts accompanying the same....

I speak of the former sort of these only, namely, the foundation or fundamental points of Christian religion, which who so subverts and renounces, he renounces also his own salvation. The other sort I look at as less principal in comparison of these, though some of them have a fundamental use in church order....

That fundamentals are so clear, that a man cannot but be convinced in conscience of the truth of them after two or three admonitions; and that, therefore, such a person as still continues obstinate is condemned of himself. And if he then be punished, he is not punished for his conscience, but for sinning against his own conscience....

Though I do maintain (as the Apostle does) a clearness of fundamental points of religion and worship (such fundamentals, I say, without which fellowship with God cannot be had), and though I grant, that in subverting such fundamental points and persisting therein after one or twice admonition, a man sins against his own conscience and is, therefore, censurable by the church, yea and by the civil magistrate also, if, after conviction, he continue to seduce others unto his damnable heresy, yet I do not herein measure to others that which myself, when I lived in such practices, would not have assured to myself....

God in times past suffered all nations to walk in their own ways. And so did His viceregents, the good Kings of Israel, do the like. David did not compel the tributary nations to worship the God of Israel. No more does our colony here compel the tributary Indians to worship our God. But if an Israelite forsakes God, he disturbs not only the Commonwealth of Israel, but the barks of pagans and heathen states, as Jonah did this ship by his departure from God. Therefore, a Christian by departing from God may disturb a gentile civil state. And it is no preposterous way for the governors of the state, according to the quality of the disturbance raised by the starting aside of such a Christian, to punish both it and him by civil censure.

Nor does the civil state in such punishments attend ... to procure the conversion of heretics, or apostates, or such like scandalous, turbulent offenders, as how to prevent the perversion of their sounder people ... or else, to work the subversion of such as do subvert both truth and peace....

Nor is the righteous proceeding in civil states a disquieting of themselves, or any unmerciful disquieting of others. For it is no disquieting to a just man to do justice; and the disquieting of men in sin ... is no unmerciful dealing, but a compassionate healing, either of themselves or others....

If it were true, that the magistrate has charge only of the bodies and goods of the subject, yet that might justly excite to watchfulness against such pollutions of religion as tend to apostasy. For if the church and people of God fall away from God, God will visit the city and country with public calamity, if not captivity, for the church's sake....

It is a carnal and worldly and, indeed, an ungodly imagination to confine the magistrate's charge to the bodies and goods of the subject, and to exclude them from the care of their souls. Did ever God commit the charge of the body to any governors to whom he did not commit (in His way) the care of souls also? Has God committed to parents the charge of the children's bodies, and not the care of their souls? To masters the charge of their servants' bodies, and not of their souls? To captains the charge of their soldiers' bodies, and not of their souls? Shall the captains suffer false worship, yea idolatry, publicly professed and practiced in the camp, and yet look to prosper in battle? The magistrates, to whom God has committed the charges of bodies and outward man of the subject, are they not also to take care to procure faithful teachers to be sent among them? ... The truth is, church governors and civil governors do herein stand parallel one to another. The church governors, though to them be chiefly committed the charge of souls as their adequate objects, yet, in order to the good of the souls of their people, to exhort from idleness, negligence, from intemperancy in meats and drinks, from oppression, and deceit, and therein provide both for the health of their bodies and the safety of their estates. So civil governors, though to them be chiefly committed the bodies and goods of the people (as their adequate object), yet, in order to [accomplish] this, they may, and ought to, procure spiritual helps to their souls and to prevent such spiritual evils as that the prosperity of religion among them might advance the prosperity of the civil state....

Reading 11: John Cotton

From *A Brief Exposition* . . ., 1655

It is no impeachment of church liberty, but an enlargement of its beauty and honor, to be bound by strict laws and holy commandments, to observe the pure worship of God, and to be subject unto due punishment for the gross violation of the same. . . .

It is a great advancement to the beauty and comeliness of a church [and] state, when people and magistrates do both consent together to purge the whole country, even to the utmost borders of the churches, from corruption in religion, and to adorn the same with exemplary justice upon notorious offenders. . . .

Reading 12: John Cotton

From *A Practical Commentary* . . ., 1656

If every anti-Christian doctrine be a lie, then they that are born of it are not born of the truth, and the doctors of it are liars, so that . . . it is a lying doctrine they hold, those that are the doctors and teachers of their church are liars; and take the body of the church, it is a bulk of lies, a company of liars, deceiving the world, and sporting themselves in their deceiving. . . .

If no heresy be of the truth, then certainly it will never be for the truth; no stream rises higher than the spring from whence it comes. If such doctrine comes not from the truth, it will never rise so high as the truth. Never look for true dealing from an heretic that lies against the Gospel, and against his own conscience; never believe any doctrine of theirs, for they aim at subverting. If they deal not truly with God, they will not deal truly with man. . . .

It may teach us there is no safe reconciliation with these doctrines; nay, no safe toleration, for no lie is of the truth. How can you reconcile night and day? light and darkness? There is as wide a difference between the truth and anti-Christian doctrines; therefore, there is no safe toleration of them, but one of them will be rooting out the other, either lies or the truth will be banished. . . .

Reading 13: Roger Williams

From *The Bloudy Tenent of Persecution,* 1644

The Argument

First, that the blood of so many hundred thousand souls of Protestants and Papists, spilt in the Wars of present and former Ages, for their respective Consciences, is not required nor accepted by Jesus Christ the Prince of Peace.

Secondly, Pregnant Scriptures and Arguments are throughout the Work proposed against the Doctrine of persecution for cause of Conscience.

Thirdly, Satisfactory Answers are given to Scriptures, and objections produced by Mr. Calvin, Beza, Mr. Cotton, and the Ministers of the New English Churches and others former and later, tending to prove the Doctrine of persecution for cause of Conscience.

Fourthly, The Doctrine of persecution for cause of Conscience, is proved guilty of all the blood of the Souls crying for vengeance under the Altar.

Fifthly, All Civil States with their Officers of justice in their respective constitutions and administrations are proved essentially Civil, and therefore not Judges, Governors or Defenders of the Spiritual or Christian State and Worship.

Sixthly, It is the will and command of God, that (since the coming of his Son the Lord Jesus) a permission of the most Paganish, Jewish, Turkish, or Antichristian consciences and worships, be granted to all men in all Nations and Countries: and they are only to be fought against with that Sword which is only (in Soul matters) able to conquer, to wit, the Sword of God's Spirit, the Word of God.

Seventhly, The state of the Land of Israel, the Kings and people thereof in Peace and War, is proved figurative and ceremonial, and no pattern nor precedent for any Kingdom or civil state in the world to follow.

Eighthly, God requireth not an uniformity of Religion to be inacted and inforced in any civil state; which inforced uniformity (sooner or later) is the greatest occasion of civil War,

ravishing of conscience, persecution of Christ Jesus in his servants, and of the hypocrisy and destruction of millions of souls.

Ninthly, In holding an inforced uniformity of Religion in a civil state, we must necessarily disclaim our desires and hopes of the Jews' conversion to Christ.

Tenthly, An inforced uniformity of Religion throughout a Nation or civil state, confounds the Civil and Religious, denies the principles of Christianity and civility, and that Jesus Christ is come in the Flesh.

Eleventhly, The permission of other consciences and worships than a state professeth, only can (according to God) procure a firm and lasting peace, (good assurance being taken according to the wisdom of the civil state for uniformity of civil obedience from all sorts).

Twelfthly, lastly, true civility and Christianity may both flourish in a state or Kingdom, notwithstanding the permission of divers and contrary consciences, either of Jew or Gentile....

Chapter XVII.

Peace. I shall now trouble you (dear Truth) but with one conclusion more, which is this: ... That if a man hold forth error with a boisterous and arrogant spirit, to the disturbance of the civil Peace, he ought to be punished....

Truth. To this I have spoken too, confessing that if any man commit ought of those things which Paul was accused of ... he ought not to be spared, yea he ought not, as Paul saith, in such cases refuse to die.

But if the matter be of another nature, a spiritual and divine nature, I have written before in many cases ... that the Worship which a State professeth may be contradicted and preached against, and yet no breach of the Civil Peace [occur]. And if a breach follow, it is not made by such doctrines, but by the boisterous and violent opposers of them.

Such persons only break the City's or Kingdom's peace, who cry out for prison and swords against such who cross their judgment and practice in Religion.... So commonly the meek and peaceable of the earth are traduced as rebels, factious, peace-breakers, although they deal not with the State or State-matters, but matters of a divine and spiritual nature, when their traducers are the only unpeaceable [ones] ... guilty of breach of Civil Peace....

Chapter LXXII.

Peace. We willingly grant you, that man hath no power to make Laws to bind conscience, but this hinders not, ... men may see the Laws of God observed which do bind conscience.

Truth. I answer ... that man hath not power to make Laws to bind conscience, he overthrows such his tenent and practice as restrain men from their Worship, according to their Conscience and belief, and constrains them to such worships (though it be out of a pretence that they are convinced) which their own souls tell them they have no satisfaction or faith in.

Secondly, whereas he affirmeth that men may make Laws to see the Laws of God observed.

I answer, as God needeth not the help of a material sword of steel to assist the sword of the Spirit in the affairs of conscience, to those men, those Magistrates, yea that Commonwealth which makes such Magistrates, must needs have power and authority from Christ Jesus to fit Judge and to determine in all the great controversies concerning doctrine, discipline, government, etc.

And then I ask, whether upon this ground it must not evidently follow, that

Either there is no lawful Commonwealth nor civil State of men in the world, which is not qualified with this spiritual discerning (and then also that the very Commonwealth hath more light concerning the Church of Christ, then the Church itself);

Or, that the Commonwealth and Magistrates thereof must judge and punish as they are persuaded in their own belief and conscience (be their conscience Paganish, Turkish, or Antichristian). What is this but to confound Heaven and Earth together, and not only to take away the being of Christianity out of the World, but to take away all civility, and the world out of the world, and to lay all upon heaps of confusion? ...

Chapter XCVI.

Lastly for the Confirmation or Ratification which they suppose Magistrates are bound to give to the Laws of Christ, I answer God's cause, Christ's Truth, and the two-edged sword of his Word, never stood in need of a temporal Sword, or a human Witness to confirm and ratify them. If we receive the witness of an honest man, the witness of the most holy God is greater, I John 5.

The result and sum of the whole matter is this: 1. It may please God sometimes to stir up the Rulers of the Earth to permit and tolerate, to favor and countenance God's people in their worships, though only out of some strong conviction of conscience or fear of wrath, etc. and yet themselves neither understand God's worship, nor leave their own state, Idolatry or Country worship. For this God's people ought to give thanks unto God; yea and all men from this example may learn not to charge upon the Magistrates' conscience (the bodies and goods of men) the Spiritual peace in the worship of God and souls of men....

Chapter XCII.

Truth. Here are diverse ... passages which I shall briefly examine, so far as concerns our controversy.

First, whereas they say, that the Civil Power may erect and establish what form of civil Government may seem in wisdom most meet, I acknowledge the position to be the most true, both in itself, and also considered with the end of it, that a civil Government is an Ordinance of God, to conserve the civil peace of people, so far as concerns their Bodies and Goods....

But from this Grant I infer ... that the ... foundation of civil power lies in the people (whom they must needs mean by the civil power distinct from the Government set up). And if so, that a People may erect and establish what form of Government seems to them most meet for their civil condition: It is evident that such Governments as are by them erected and established, have no more power, nor for no longer time, then the civil power or people consenting and agreeing shall betrust them with. This is clear not only in Reason, but in the experience of all commonweals, where the people are not deprived of their natural freedom by the power of Tyrants.

And If so, that the Magistrates receive their power of governing the Church, from the People; undeniably it follows, that a people, as a people, naturally considered ... have fundamentally and originally, as men, a power to govern the Church, to see her do her duty, to correct her, to redress, reform establish, etc. And if this be not to pull God and Christ, and Spirit out of Heaven, and subject them unto natural, sinful, inconstant men, and so consequently to Satan himself, by whom all peoples naturally are guided, let Heaven and Earth judge....

Chapter CXXVI.

Truth. Although (dear Peace) we both agree that civil powers may not ... enforce on any [of] God's Institutions ... Yet for further illustration I shall propose some queries concerning the civil Magistrates passing in the ship of the Church, wherein Christ Jesus hath appointed his Ministers and Officers as Governors and Pilots, etc.

If in a ship at Sea, wherein the Governor or Pilot of a ship undertakes to carry the ship to such a Port, the civil Magistrate (suppose a King or Emperor) shall command the Master such and such a course, to steer upon such and such a point, which the Master knows is not their course, and which if they steer he shall never bring the Ship to that Port or harbor: what shall the Master do? Surely all men will say, the Master of the Ship or Pilot is to present Reasons and Arguments from his Mariner's Art ... or else in humble and submissive manner to persuade the Prince not to interrupt them in their course and duty properly belonging to them, to wit, governing of the ship, steering ... the course, etc.

If the Master of the Ship command the Mariners thus and thus in steering the ship ..., and the Prince command the Mariners a different or contrary course, who is to be obeyed?

It is confessed that the Mariners may lawfully disobey the Prince, and obey the governor of the ship in the actions of the ship....

... Suppose the Master out of base fear and cowardice, or covetous desire of reward, shall yield to gratify the mind of the Prince, contrary to the rules of Art and Experience, etc. and the ship come in danger, and perish, and the Prince with it: if the Master gets to shore, ... may he not be justly questioned, yea and suffer as guilty of the Prince's death, and those that perished with him? These cases are clear, ... the Prince ought not to govern and rule the actions of the ship, but such whose office and charge and skill it is.

The result of all is this: The Church of Christ is the Ship, wherein the Prince ... is a passenger. In this ship the Officers and Governors, such as are appointed by the Lord Jesus, they are ... above the Prince himself, and are to be obeyed and submitted to in their words and administrations, even before the Prince himself.

In this respect every Christian in the Church, man or woman ... ought to be of higher esteem (concerning Religion and Christianity) than all the Princes in the world, who have either none or less grace or knowledge of Christ; although in civil things all civil reverence, honor and obedience ought to be yielded by all men.

Therefore, if in matters of Religion the King command what is contrary to Christ's rule (though according to his persuasion and conscience) who sees not that ... he ought not be obeyed? yea, and ... boldly with spiritual force and power he ought to be resisted: And if any Officer of the Church of Christ shall out of baseness yield to the command of the Prince, to the danger of the Church, and souls committed to his charge, the souls that perish ... shall be laid to his charge.

... How agree these truths ... with those former positions, viz. that the Civil Magistrate is keeper of both Tables, That he is to see the Church do her duty, That he ought to establish the true Religion, suppress and punish the false, and so consequently must discern, judge and determine what the true gathering and governing of the Church is ... I desire it may be answered in the fear and presence of him whose eyes are as a flame of fire, if this be not ... to be Governor of the Ship of the Church, to see the Master, Pilot, and Mariners do their duty ... and where they fail, to punish them; and therefore by undeniable consequence, to judge and determine what their duties are, when they do right, and when they do wrong....

The similitude of a Physician obeying the Prince in the Body politic; but prescribing to the Prince concerning the Prince's body, wherein the Prince (unless the Physician manifestly err) is to be obedient to the Physician, and not to be Judge of the Physician in his Art, but to be ruled and judged (as touching the state of his body) by the Physician: I say this similitude and many others suiting with the former of a ship, might be alleged to prove the distinction of the Civil and Spiritual estate, and that according to the rule of the Lord Jesus in the Gospel, the Civil Magistrate is only to attend the Calling of the Civil Magistracy, concerning the bodies and goods of the Subjects, and is himself (if a member of the Church ...) subject to the power of the Lord Jesus therein, as any member of the Church is, I Cor. 5.

Reading 14: Roger Williams

Letter to Town of Providence, 1655

... There goes many a ship to sea, with many hundred souls in one ship, whose weal and woe is common, and is a true picture of a commonwealth, or a human combination of society. It hath fallen out sometimes, that both papists and protestants, Jews and Turks, may be embarked in one ship; upon which supposal I affirm, that all the liberty of conscience, that ever I pleaded for, turns upon these two hinges—that none of the papists, protestants, Jews, or Turks, be forced to come to the ship's prayers or worship, if they practice any. I further add, that I never denied, that notwithstanding this liberty, the commander of this ship ought to command the ship's course, yea, and also command that justice, peace and sobriety, be kept and practiced, both among the seamen and all the passengers. If any of the seamen refuse to perform their services, or passengers to pay their freight; if any refuse to help, in person or purse, towards the common charges or defence; if any refuse to obey the common laws and orders of the ship, concerning their common peace or preservation; if any shall mutiny and rise up against their commanders and officers; if any should preach or write that there ought to be no commanders or officers, because all are equal in Christ, therefore no masters nor officers, no laws nor orders, no corrections nor punishments:—I say, I never denied, but in such cases, whatever is pretended, the commander or commanders may judge, resist, compel and punish such transgressors, according to their deserts and merits....

Reading 15: Maryland Toleration Act, 1649

Forasmuch as in a well-governed and Christian commonwealth, matters concerning religion and the honor of God ought in the first place to be taken into serious consideration and endeavored to be settled, *be it therefore ordered and enacted*, by the Right Honorable Cecilius, Lord Baron of Baltimore, Absolute Lord and Proprietary of this province, with the advice and consent of this General Assembly, that whatsoever person or persons within this province and the islands thereunto belonging shall henceforth blaspheme God, that is, curse Him, or deny our Savior Jesus Christ to be the Son of God, or shall deny the Holy Trinity—the Father, Son, and Holy Ghost— or the Godhead or any of the said three Persons of the Trinity or the unity of the Godhead, or shall use or utter any reproachful speeches, words, or language concerning the said Holy Trinity, or any of the said three Persons thereof, shall be punished with death and confiscation or forfeiture of all his or her lands and goods to the Lord Proprietary and his heirs....

And be it further likewise enacted, by the authority and consent aforesaid, that every person and persons within this province that shall at any time hereafter profane the Sabbath or Lord's Day called Sunday, by frequent swearing, drunkenness, or by any uncivil or disorderly recreation, or by working on that day when absolute necessity does not require it, shall for every such first offense forfeit 2s. 6d., or the value thereof, and for the second offense 5s. or the value thereof, and for the third offense and so for every time he shall offend in like manner afterward, 10s., or the value thereof. And in case such offender and offenders shall not have sufficient goods or chattels within this province to satisfy any of the said penalties respectively hereby imposed for profaning the Sabbath or Lord's Day called Sunday as aforesaid, that in every such case the party so offending shall for the first and second offense in that kind be imprisoned till he or she shall publicly in open court before the chief commander, judge, or magistrate of that county, town, or precinct where such offense shall be committed acknowledge the scandal and offense he has in that respect given against God and the good and civil government of this province, and for the third offense and for every time thereafter shall also be publicly whipped.

And whereas the enforcing of the conscience in matters of religion has frequently fallen out to be of dangerous consequence in those commonwealths where it has been practised, and for the more quiet and peaceable government of this province, and the better to preserve mutual love and amity among the inhabitants thereof, be it, therefore, also by the Lord Proprietary, with the advice and consent of this assembly, ordained and enacted (except as in this present act is before declared and set forth) that no person or persons whatsoever within this province, or the islands, ports, harbors, creeks, or havens thereunto belonging, professing to believe in Jesus Christ, shall from henceforth be in any way troubled, molested, or discountenanced for or in respect of his or her religion, nor in the free exercise thereof within this province or the islands thereunto belonging, nor in any way compelled to the belief or exercise of any other religion against his or her consent, so as they be not unfaithful to the Lord Proprietary, or molest or conspire against the civil government established or to be established in this province under him or his heirs.

And that all and every person and persons that shall presume contrary to this act and the true intent and meaning thereof directly or indirectly either in person or estate willfully to wrong, disturb, trouble, or molest any person whatsoever within this province professing to believe in Jesus Christ for, or in respect of, his or her religion or the free exercise thereof, within this province other than is provided for in this act, that such person or persons so offending shall be compelled to pay treble damages to the party so wronged or molested, and for every such offense shall also forfeit 20s. in money or the value thereof, half thereof for the use of the Lord Proprietary, and his heirs, Lords, and Proprietaries of this province, and the other half for the use of the party so wronged or molested as aforesaid. Or if the party so offending shall refuse or be unable to recompense the party so wronged, or to satisfy such fine or forfeiture, then such offender shall be severely punished by public whipping and imprisonment, during the pleasure of the Lord Proprietary, or his lieutenant or chief governor of this province, for the time being without bail or mainprise.

And be it further also enacted, by the authority and consent aforesaid, that the sheriff or other officer or officers from time to time to be appointed and authorized for that purpose, of the county, town, or precinct where every particular offense in this present act contained shall happen at any time to be committed and whereupon there is hereby a forfeiture, fine, or penalty imposed, shall from time to time distrain and seize the goods and estate of every such person so offending as aforesaid against this present act or any part thereof, and sell the same or any part thereof for the full satisfaction of such forfeiture, fine, or penalty as aforesaid, restoring unto the party so offending the remainder or overplus of the said goods or estate after such satisfaction so made as aforesaid.

The freemen have assented.

Thomas Hatton

Enacted by the Governor William Stone.

Reading 16: William Penn

The Great Case of Liberty of Conscience, **(1670)**

Preface

Were some as Christian as they boast themselves to be, it would save us all the labor we bestow in rendering Persecution so unchristian as it most truly is. Nay, were they those men of reason they character themselves, and what the civil law styles good citizens, it had been needless for us to tell them, that neither can any external coercive power convince the understanding of the poorest idiot, nor fines and prisons be judged fit and adequate penalties for faults purely intellectual; as well as that they are destructive of all civil government....

Not that we are so ignorant, as to think it is within the reach of human power to fetter conscience, or to restrain its liberty, strictly taken: but that plain English, of Liberty of Conscience, we would be understood to mean, is this; namely, "The free and uninterrupted exercise of our consciences, in that way of worship we are most clearly persuaded God requires us to serve him in, without endangering our undoubted birth-right of English freedoms:" Which being matter of FAITH, we sin if we omit; and they cannot do less, that shall endeavor it....

Chapter I

The great case of Liberty of Conscience, so often debated and defended (however dissatisfactorily to such as have so little conscience as to persecute for it) is once more brought to public view....

For mine own part, I publicly confess myself to be a very hearty Dissenter from the established worship of these nations, as believing Protestants to have much degenerated from their first principles, and as owning the poor despised Quakers, in life and doctrine, to have espoused the cause of God, and to be the undoubted followers of Jesus Christ, in his most holy, strait, and narrow way, that leads to the eternal rest. In all which I know no treason, nor any principle that

would urge me to a thought injurious to the civil peace. If any be defective in this particular, it is equal both individuals and whole societies should answer for their own defaults....

In short we say, there can be but two ends in persecution; the one to satisfy (which none can ever do) the insatiable appetites of a decimating clergy (whose best arguments are fines and imprisonments); and the other, as thinking therein they do God good service; but it is so hateful a thing upon any account, that we shall make it appear, by this ensuing discourse, to be a declared enemy to God, religion, and the good of human society....

First, By Liberty of Conscience, we understand not only a mere Liberty of the Mind, in believing or disbelieving this or that principle or doctrine; but "the exercise of ourselves in a visible way of worship, upon our believing it to be indispensably required at our hands, that if we neglect it for fear or favor of any mortal man, we sin, and incur divine wrath." Yet we would be so understood to extend and justify the lawfulness of our so meeting to worship God, as not to contrive, or abet any contrivance destructive of the government and laws of the land, tending to matters of an external nature, directly or indirectly; but so far only as it may refer to religious matters, and a life to come, and consequently wholly independent of the secular affairs of this, wherein we are supposed to transgress.

Secondly, By imposition, restraint, and persecution, we do not only mean the strict requiring of us to believe this to be true, or that to be false; and upon refusal, to incur the penalties enacted in such cases; but by those terms we mean thus much, "any coercive let or hindrance to us, from meeting together to perform those religious exercises which are according to our faith and persuasion"....

For proof of the aforesaid terms thus given, we singly state the question thus;

Whether imposition, restraint, and persecution, upon persons for exercising such a liberty of conscience as is before expressed, and so circumstantiated, be not to impeach the honor of God, the meekness of the Christian religion, the authority of Scripture, the privilege of nature, the principles of common reason, the well being of government, and apprehensions of the greatest personages of former and latter ages?

First, Then we say, that Imposition, Restraint, and Persecution, for matters relating to conscience, directly invade the divine prerogative, and divest the Almighty of a due, proper to none besides himself. And this we prove by these five particulars:

First, If we do allow the honor of our creation due to God only, and that no other besides himself has endowed us with those excellent gifts of Understanding, Reason, Judgment, and Faith, and consequently that he only is the object, as well as the author, both of our Faith, Worship, and Service; then whosoever shall interpose their authority to enact faith and worship in a way that seems not to us congruous with what he has discovered to us to be faith and worship (whose alone property it is to do it) or to restrain us from what we are persuaded is our indispensable duty, they evidently usurp this authority, and invade his incommunicable right of government over conscience: "For the Inspiration of the Almighty gives understanding: and faith is the gift of God," says the divine writ.

Secondly, Such magisterial determinations carry an evident claim to that infallibility, which Protestants have been hitherto so jealous of owning, that, to avoid the Papists, they have denied it to all but God himself.

Either they have forsook their old plea; or if not, we desire to know when, and where, they were invested with that divine excellency; and whether imposition, restraint, and persecution, were ever deemed by God the fruits of his Spirit. However, that itself was not sufficient; for unless it appears as well to us that they have it, as to them who have it, we cannot believe it upon any convincing evidence, but by tradition only, an anti-protestant way of believing.

Thirdly, It enthrones man as king over conscience, the alone just claim and privilege of his Creator; whose thoughts are not as men's thoughts, but has reserved to himself that empire from all the Caesars on earth: For if men, in reference to souls and bodies, things appertaining to this and the other world, shall be subject to their fellow-creatures, what follows, but that Caesar (however he got it) has all, God's share, and his own too? And being Lord of both, both are Caesar's, and not God's.

Fourthly, It defeats God's work of Grace, and the invisible operation of his eternal Spirit, (which can alone beget faith, and is only to be obeyed, in and about religion and worship) and attributes men's conformity to outward force and corporal punishments.

Fifthly and lastly, Such persons assume the judgment of the great tribunal unto themselves; for to whomsoever men are imposedly or restrictively subject and accountable in matters of faith, worship and conscience; in them alone must the power of judgment reside; but it is equally true that God shall judge all by Jesus Christ, and that no man is so accountable to his fellow-creatures, as to be imposed upon, restrained, or persecuted for any matter of conscience whatever.

Thus, and in many more particulars, are men accustomed to intrench upon Divine Property, to gratify particular interests in the world; and (at best) through a misguided apprehension to imagine "they do God good service," that where they cannot give faith, they will use force; which kind of sacrifice is nothing less unreasonable than the other is abominable: God will not give his honor to another; and to him only, that searches the heart and tries the reins, it is our duty to ascribe the gifts of understanding and faith, without which none can please God.

Chapter II

The next great evil which attends external force in matters of faith and worship, is no less than the overthrow of the whole Christian religion; and this we will briefly evidence in these four particulars, 1. That there can be nothing more remote from the nature, 2. The practice, 3. The promotion, 4. The rewards of it.

First, It is the privilege of the Christian faith above the dark suggestions of ancient and modern superstitious traditions, to carry with it a most self-evidencing verity, which ever was sufficient to proselyte believers, without the weak auxiliaries of external power. The Son of God, and great example of the world, was so far from calling his Father's omnipotency in legions of angels to his defence, that he at once repealed all acts of force, and defined to us the nature of his religion in this one great saying of his, MY KINGDOM IS NOT OF THIS WORLD. It was spiritual, not carnal; accompanied with weapons as heavenly as its own nature, and designed for the good and salvation of the soul, and not the injury and destruction of the body: no gaols, fines, exiles, etc. but "sound Reason, clear Truth, and strict Life." In short, the Christian religion intreats all, but compels none.

Secondly, That restraint and persecution overturn the practice of it. I . . . begin with Abel, go down to Moses, so to the Prophets, and then to the meek example of Jesus Christ himself; how patiently devoted was he to undergo the contradictions of men and so far from persecuting any, that he would not so much as revile his persecutors, but prayed for them. Thus lived his apostles, and the true Christians of the first three hundred years. Nor are the famous stories of our first reformers silent in the matter; witness the Christian practices of the Waldenses, Lollards, Hussites, Lutherans, and our noble martyrs; who, as became the true followers of Jesus Christ, enacted and confirmed their religion with their own blood, and not with the blood of their opposers.

Thirdly, Restraint and persecution obstruct the promotion of the Christian Religion: For if such as restrain, confess themselves "miserable sinners, and altogether imperfect," it either follows, that they never desire to be better, or that they should encourage such as may be capable of farther informing and reforming them: They condemn the Papists for incoffining the Scriptures and their worship in an unknown tongue, and yet are guilty themselves of the same kind of fact.

Fourthly, They prevent many of eternal rewards: For where any are religious for fear, and that of men, it is slavish, and the recompence of such religion is condemnation, not peace: besides, it is man that is served; who having no power but what is temporary, his reward must needs be so too: he that imposes a duty, or restrains from one, must reward; but because no man can reward for such duties, no man can or ought to impose them, or restrain from them. So that we conclude Imposition, Restraint and Persecution, are destructive of the Christian religion, in the Nature, Practice, Promotion and Rewards of it, which are eternal. . . .

Chapter V

We next urge, that force, in matters relating to conscience, carries a plain contradiction to government, in the nature, execution, and end of it.

By government we understand, an external order of justice, or the right and prudent disciplining of any society by just laws, either in the relaxation or execution of them.

First, It carries a contradiction to government in the nature of it, which is justice, and that in three respects.

1. It is the first lesson that . . . . "To do as they would be done to;" since he that gives what he would not take, or takes what he would not give, only shows care for himself, but neither kindness nor justice for another.

2. The just nature of government lies in a fair and equal retribution: but what can be more unequal, than that men should be rated more than their proportion to answer the necessities of government, and yet that they should not only receive no protection from it, but by it be disseised of their dear liberty and properties? We say, to be compelled to pay that power that exerts itself to ruin those that pay it, or that any should be required to enrich those that ruin them, is hard and unequal, and therefore contrary to the just nature of government. If we must be contributaries to the maintenance of it, we are entitled to a protection from it.

3. It is the justice of government to proportion penalties to the crime committed. Now granting our dissent to be a fault, yet the infliction of a corporal or external punishment, for a mere mental error (and that not voluntary) is unreasonable and inadequate, as well as against particular directions of the Scriptures, Tit. iii. 9, 10, 11. For as corporal penalties cannot convince the understanding; so neither can they be commensurate punishments for faults purely intellectual: and for the government of this world to intermeddle with what belongs to the government of another, and which can have no ill aspect or influence upon it, shows more of invasion than right and justice.

Secondly, It carries a contradiction to government in the execution of it, which is prudence, and that in these instances.

1. The state of the case is this, that there is no republic so great, no empire so vast, but the laws of them are resolvable into these two series or heads; "Of laws fundamental, which are indispensable and immutable; and laws superficial, which are temporary and alterable;" and as it is justice and prudence to be punctual in the execution of the former, so by circumstances, it may be neither to execute the latter, they being suited to the present conveniency and emergency of state; as the prohibiting of cattle out of Ireland was judged by

advantage to the farmers of England, yet a murrain would make it the good of the whole that the law should be broke, or at least the execution of it suspended. That the law of restraint, in point of conscience, is of this number, we may further manifest, and the imprudence of thinking otherwise: for first, if the saying were as true as it is false, "No bishop, no king," (which admits of various readings; as "no decimating clergy, or no persecution, no king,") we should be as silent as some would have us; but the confidence of their assertion, and the impolicy of such as believe it, makes us to say, that a greater injury cannot be done to the present government. For if such laws and establishments are fundamental, they are as immutable as mankind itself; but that they are as alterable as the conjectures and opinions of governors have been, is evident; since the same fundamental indispensable laws and policy of these kingdoms have still remained, through all variety of opposite ruling opinions and judgments, and disjoined from them all. Therefore to admit of such a fixation to temporary laws, must needs be highly imprudent, and destructive of the essential parts of the government of these countries.

* * *

5. It strikes fatally at Protestant sincerity: for will the Papists say, Did Protestants exclaim against us for persecutors, and are they now the men themselves? Was it an instance of weakness in our religion, and is it become a demonstration of strength in theirs? Have they transmuted it from antichristian in us, to christian in themselves? let persecutors answer.

6. It is not only an example, but an incentive to the Romanists to persecute the reformed religion abroad: for when they see their actions (once void of all excuse) now defended by the example of Protestants, that once accused them, (but now themselves) doubtless they will revive their cruelty.

7. It overturns the very ground of the Protestants retreat from Rome: for if men must be restrained, upon pretended prudential considerations, from the exercise of their conscience in England; why not the same in France, Holland, Germany, Constantinople, etc. where matters of state may equally be pleaded? This makes religion state-policy; and faith and worship, subservient to the humors and interests of superiors: such doctrine would have prevented our ancestors retreat; and we wish it be not the beginning of a back-march; for some think it shrewdly to be suspected, where religion is suited to the government, and conscience to its conveniency.

8. Vice is encouraged: for if licentious persons see men of virtue molested for assembling with a religious purpose to reverence and worship God, and that are otherwise most serviceable to the commonwealth, they may and will infer, it is better for them to be as they are; since not to be demure, as they call it, is halfway to that kind of accomplishment which procures preferment.

9. For such persons as are so poor-spirited as to truckle under such restraints, what conquest is there over them, that before were conscientious men, and now hypocrites? who so forward to be avenged of them, that brought this guilt upon them, as they themselves? and how can the imposers be secure of their friendship, whom they have taught to change with the times?

10. Such laws are so far from benefiting the country, that the execution of them will be the assured ruin of it, in the revenues, and consequently in the power of it: for where there is a decay of families, there will be of trade; so of wealth, and in the end of strength and power: and if both kinds of relief fail, men, the prop of republicks; money, the stay of monarchies; this, as requiring mercenaries; that, as needing freemen; farewell the interest of England! 'tis true, the priests get (though that is but for a time) but the king and people lose, as the event will show.

11. It ever was the prudence of wise magistrates to oblige their people; but what comes shorter of it than persecution? what dearer to them than the liberty of their conscience? what cannot they better spare than it? their peace consists in the enjoyment of it; and he that by compliance has lost it, carries his penalty with him, and is his own prison. Surely such practices must render the government uneasy, and beget a great disrespect to the governors, in the hearts of the people.

12. But that which concludes our prudential part shall be this, that after all their pains and good-will to stretch men to their measure, they never will be able to accomplish their end: and if he be an unwise man, that provides means where he designs no end, how near is he of kin to him that proposes an end unobtainable. Experience has told us. 1. How invective it has made the imposed-on. 2. What distraction have ensued such attempts. 3. What reproach has followed to the Christian religion, when the professors of it have used a coercive power upon conscience. And lastly, That force never yet made either a good Christian, or a good subject.

Thirdly, and lastly, Since the proceedings we argue against are proved so destructive to the justice and prudence of government, we ought the less to wonder that they should hold the same malignity against the end of it, which is felicity, since the wonder would be to find it otherwise; and this is evident from these three considerations:

1. Peace (the end of war and government, and its great happiness too) has been, is, and yet will be, broken by the frequent tumultuary disturbance that ensue the disquieting our meetings, and the estreating fines upon our goods and estates. And what these things may issue in, concerneth the civil magistrate to consider.

2. Plenty (another great end of government) will be converted into poverty, by the destruction of so many thousand families as refuse compliance and conformity, and that

not only to the sufferers, but influentially to all the rest; a demonstration of which we have in all those places where the late act has been any thing considerably put in execution. Besides, how great provocation such incharity and cruel usage, as stripping widows, fatherless, and poor, of their very necessaries for human life, merely upon an account of faith or worship, must needs be to the just and righteous Lord of heaven and earth, scriptures, and plenty of other histories, plainly shown us.

3. Unity (not the least, but greatest end of government) is lost: for by seeking an unity of opinion, by the ways intended, the unity requisite to uphold us as a civil society, will be quite destroyed. And such as relinquish that, to get the other, besides that they are unwise, will infallibly lose both in the end.

In short, we say that it is unreasonable we should not be entertained as men, because some think we are not as good Christians as they pretend to wish us; or that we should be deprived of our liberties and properties, who never broke the laws that gave them to us: what can be harder, than to take that from us by a law, which the great indulgence and solicitude of our ancestors took so much pains to intail upon us by law. . . .

Reading 17: John Locke

"A Letter Concerning Toleration," 1689

Honoured Sir,

Since you are pleased to inquire what are my thoughts about the mutual toleration of Christians in their different professions of religion, I must needs answer you freely that I esteem that toleration to be the chief characteristic mark of the true Church. For whatsoever some people boast of the antiquity of places and names, or of the pomp of their outward worship; others, of the reformation of their discipline; all, of the orthodoxy of their faith—for everyone is orthodox to himself—these things, and all others of this nature, are much rather marks of men striving for power and empire over one another than of the Church of Christ. Let anyone have never so true a claim to all these things, yet if he be destitute of charity, meekness, and good-will in general towards all mankind, even to those that are not Christians, he is certainly yet short of being a true Christian himself. "The kings of the Gentiles exercise lordship over them," said our Saviour to His disciples, "but ye shall not be so."[1] The business of true religion is quite another thing. It is not instituted in order to the erecting of an external pomp, nor to the obtaining of ecclesiastical dominion, nor to the exercising of compulsive force, but to the regulating of men's lives, according to the rules of virtue and piety. Whosoever will list himself under the banner of Christ, must, in the first place and above all things, make war upon his own lusts and vices. It is in vain for any man to usurp the name of Christian, without holiness of life, purity of manners, benignity and meekness of spirit. "Let everyone that nameth the name of Christ, depart from iniquity."[2] "Thou, when thou art converted, strengthen thy brethren," said our Lord to Peter.[3] It would, indeed, be very hard for one that appears careless about his own salvation to persuade me that he were extremely concerned for mine. For it is impossible that those should sincerely and heartily apply themselves to make other people Christians, who have not really embraced the Christian religion in their own hearts. If the Gospel and the apostles may be credited, no man can be a Christian without charity and without that faith which works, not by force, but by love. Now, I appeal to the consciences of those that persecute, torment, destroy, and kill other men upon pretence of religion, whether they do it out of friendship and kindness towards them or no? And I shall then indeed, and not until then, believe they do so, when I shall see those fiery zealots correcting, in the same manner, their friends and familiar acquaintance for the manifest sins they commit against the precepts of the Gospel; when I shall see them persecute with fire and sword the members of their own communion that are tainted with enormous vices and without amendment are in danger of eternal perdition; and when I shall see them thus express their love and desire of the salvation of their souls by the infliction of torments and exercise of all manner of cruelties. For if it be out of a principle of charity, as they pretend, and love to men's souls that they deprive them of their estates, maim them with corporal punishments, starve and torment them in noisome prisons, and in the end even take away their lives—I say, if all this be done merely to make men Christians and procure their salvation, why then do they suffer whoredom, fraud, malice, and such-like enormities, which (according to the apostle)[4] manifestly relish of heathenish corruption, to predominate so much and abound amongst their flocks and people? These, and such-like things, are certainly more contrary to the glory of God, to the purity of the Church, and to the salvation of souls, than any conscientious dissent from ecclesiastical decisions, or separation from public worship, whilst accompanied with innocence of life. Why, then, does this burning zeal for God, for the Church, and for the salvation of souls—burning I say, literally, with fire and faggot—pass by those moral vices and wickednesses, without any chastisement, which are acknowledged by all men to be diametrically opposite to the profession of Christianity, and bend all

its nerves either to the introducing of ceremonies, or to the establishment of opinions, which for the most part are about nice and intricate matters, that exceed the capacity of ordinary understandings? Which of the parties contending about these things is in the right, which of them is guilty of schism or heresy, whether those that domineer or those that suffer, will then at last be manifest when the causes of their separation comes to be judged of. He, certainly, that follows Christ, embraces His doctrine, and bears His Yoke, though he forsake both father and mother, separate from the public assemblies and ceremonies of his country, or whomsoever or whatsoever else he relinquishes, will not then be judged a heretic....

The toleration of those that differ from others in matters of religion is so agreeable to the Gospel of Jesus Christ, and to the genuine reason of mankind, that it seems monstrous for men to be so blind as not to perceive the necessity and advantage of it in so clear a light. I will not here tax the pride and ambition of some, the passion and uncharitable zeal of others. These are faults from which human affairs can perhaps scarce ever be perfectly freed; but yet such as nobody will bear the plain imputation of, without covering them with some specious colour; and so pretend to commendation, whilst they are carried away by their own irregular passions. But, however, that some may not colour their spirit of persecution and unchristian cruelty with a pretence of care of the public weal and observation of the laws; and that others, under pretence of religion, may not seek impunity for their libertinism and licentiousness; in a word, that none may impose either upon himself or others, by the pretences of loyalty and obedience to the prince, or of tenderness and sincerity in the worship of God; I esteem it above all things necessary to distinguish exactly the business of civil government from that of religion and to settle the just bounds that lie between the one and the other. If this be not done, there can be no end put to the controversies that will be always arising between those that have, or at least pretend to have, on the one side, a concernment for the interest of men's souls, and, on the other side, a care of the commonwealth.

The commonwealth seems to me to be a society of men constituted only for the procuring, preserving, and advancing their own civil interests.

Civil interests I call life, liberty, health, and indolency of body; and the possession of outward things, such as money, lands, houses, furniture, and the like.

It is the duty of the civil magistrate, by the impartial execution of equal laws, to secure unto all the people in general and to every one of his subjects in particular the just possession of these things belonging to this life. If anyone presume to violate the laws of public justice and equity, established for the preservation of those things, his presumption is to be checked by the fear of punishment, consisting of the deprivation or diminution of those civil interests, or goods, which otherwise he might and ought to enjoy. But seeing no man does willingly suffer himself to be punished by the deprivation of any part of his goods, and much less of his liberty or life, therefore, is the magistrate armed with the force and strength of all his subjects, in order to the punishment of those that violate any other man's rights.

Now that the whole jurisdiction of the magistrate reaches only to these civil concernments, and that all civil power, right and dominion, is bounded and confined to the only care of promoting these things; and that it neither can nor ought in any manner to be extended to the salvation of souls, these following considerations seem unto me abundantly to demonstrate.

First, because the care of souls is not committed to the civil magistrate, any more than to other men. It is not committed unto him, I say, by God; because it appears not that God has ever given any such authority to one man over another as to compel anyone to his religion. Nor can any such power be vested in the magistrate by the consent of the people, because no man can so far abandon the care of his own salvation as blindly to leave to the choice of any other, whether prince or subject, to prescribe to him what faith or worship he shall embrace. For no man can, if he would, conform his faith to the dictates of another. All the life and power of true religion consist in the inward and full persuasion of the mind; and faith is not faith without believing. Whatever profession we make, to whatever outward worship we conform, if we are not fully satisfied in our own mind that the one is true and the other well pleasing unto God, such profession and such practice, far from being any furtherance, are indeed great obstacles to our salvation. For in this manner, instead of expiating other sins by the exercise of religion, I say, in offering thus unto God Almighty such a worship as we esteem to be displeasing unto him, we add unto the number of our other sins those also of hypocrisy and contempt of His Divine Majesty.

In the second place, the care of souls cannot belong to the civil magistrate, because his power consists only in outward force; but true and saving religion consists in the inward persuasion of the mind, without which nothing can be acceptable to God. And such is the nature of the understanding, that it cannot be compelled to the belief of anything by outward force. Confiscation of estate, imprisonment, torments, nothing of that nature can have any such efficacy as to make men change the inward judgement that they have framed of things....

In the third place, the care of the salvation of men's souls cannot belong to the magistrate, because, though the rigour of laws and the force of penalties were capable to convince and change men's minds, yet would not that help at all to the salvation of their souls. For there being but one truth, one way to

heaven, what hope is there that more men would be led into it if they had no rule but the religion of the court and were put under the necessity to quit the light of their own reason, and oppose the dictates of their own consciences, and blindly to resign themselves up to the will of their governors and to the religion which either ignorance, ambition, or superstition had chanced to establish in the countries where they were born? In the variety and contradiction of opinions in religion, wherein the princes of the world are as much divided as in their secular interests, the narrow way would be much straitened; one country alone would be in the right, and all the rest of the world put under an obligation of following their princes in the ways that lead to destruction; and that which heightens the absurdity, and very ill suits the notion of a Deity, men would owe their eternal happiness or misery to the places of their nativity....

These things being thus determined, let us inquire, in the next place: How far the duty of toleration extends, and what is required from everyone by it?

And, first, I hold that no church is bound, by the duty of toleration, to retain any such person in her bosom as, after admonition, continues obstinately to offend against the laws of the society. For, these being the condition of communion and the bond of the society, if the breach of them were permitted without any animadversion the society would immediately be thereby dissolved. But, nevertheless, in all such cases care is to be taken that the sentence of excommunication, and the execution thereof, carry with it no rough usage of word or action whereby the ejected person may any wise be damnified in body or estate. For all force (as has often been said) belongs only to the magistrate, nor ought any private persons at any time to use force, unless it be in self-defence against unjust violence. Excommunication neither does, nor can, deprive the excommunicated person of any of those civil goods that he formerly possessed. All those things belong to the civil government and are under the magistrate's protection. The whole force of excommunication consists only in this: that, the resolution of the society in that respect being declared, the union that was between the body and some member comes thereby to be dissolved; and, that relation ceasing, the participation of some certain things which the society communicated to its members, and unto which no man has any civil right, comes also to cease. For there is no civil injury done unto the excommunicated person by the church minister's refusing him that bread and wine, in the celebration of the Lord's Supper, which was not bought with his but other men's money.

Secondly, no private person has any right in any manner to prejudice another person in his civil enjoyments because he is of another church or religion. All the rights and franchises that belong to him as a man, or as a denizen, are inviolably to be preserved to him. These are not the business of religion. No violence nor injury is to be offered him, whether he be Christian or Pagan. Nay, we must not content ourselves with the narrow measures of bare justice; charity, bounty, and liberality must be added to it. This the Gospel enjoins, this reason directs, and this that natural fellowship we are born into requires of us. If any man err from the right way, it is his own misfortune, no injury to thee; nor therefore art thou to punish him in the things of this life because thou supposest he will be miserable in that which is to come....

The sum of all we drive at is that every man may enjoy the same rights that are granted to others. Is it permitted to worship God in the Roman manner? Let it be permitted to do it in the Geneva form also. Is it permitted to speak Latin in the market-place? Let those that have a mind to it be permitted to do it also in the Church. Is it lawful for any man in his own house to kneel, stand, sit, or use any other posture; and to clothe himself in white or black, in short or in long garments? Let it not be made unlawful to eat bread, drink wine, or wash with water in the church. In a word, whatsoever things are left free by law in the common occasions of life, let them remain free unto every Church in divine worship. Let no man's life, or body, or house, or estate, suffer any manner of prejudice upon these accounts. Can you allow of the Presbyterian discipline? Why should not the Episcopal also have what they like? Ecclesiastical authority, whether it be administered by the hands of a single person or many, is everywhere the same; and neither has any jurisdiction in things civil, nor any manner of power of compulsion, nor anything at all to do with riches and revenues....

God Almighty grant, I beseech Him, that the gospel of peace may at length be preached, and that civil magistrates, growing more careful to conform their own consciences to the law of God and less solicitous about the binding of other men's consciences by human laws, may, like fathers of their country, direct all their counsels and endeavours to promote universally the civil welfare of all their children, except only of such as are arrogant, ungovernable, and injurious to their brethren; and that all ecclesiastical men, who boast themselves to be the successors of the Apostles, walking peaceably and modestly in the Apostles' steps, without intermeddling with State Affairs, may apply themselves wholly to promote the salvation of souls.

Farewell

---

[1]Luke 22. 25.
[2]II Tim. 2. 19.
[3]Luke 22. 32.
[4]Rom. 1.

Questions for Discussion

1. Do you believe that Cotton's arguments present issues that are not adequately addressed by the critics who follow? Does he convince you that there is a legitimate role for government in coming to the aid of the dominant religion?

2. Do you agree with Williams' views on the proper spheres of religion and government? Do you believe he is sensitive to what may be the conflict between secular orders and religious belief?

3. Maryland was founded as a haven for Roman Catholics. Do you feel that they were adequately protected by the Toleration Act?

4. How does Penn's argument for liberty of conscience differ from Locke's? Is the difference significant?

5. What is the difference between toleration and liberty?

6. Do you feel that the writers in this section help you cope with contemporary issues of religion and government?

Chapter Three

The Rights of Man and Other Bases for Religious Liberty: A Practical Accommodation or a Moral Imperative?

It seems fitting that the last chapter concluded with a selection from John Locke and that this chapter begins with another one, for Locke so clearly anticipates the intellectual character of the eighteenth century. The age was to be labeled one of reason or enlightenment. Man sought counsel from his reason and saw this faculty as a divine gift given to him to understand his maker and to solve the problems of earthly existence.

The presumptuousness of American colonies rebelling against the English Crown can only be comprehended in terms of the largely secular political philosophy that had been absorbed by American political leaders in the latter part of the century. That there were rights men possessed that no government could transgress was an article of this political faith and an impetus to action.

This seeming digression from our subject is no digression at all, for as Locke's list was extended by American colonials the liberty of conscience or the right to worship freely occupied a prominent position on that list. Instead of appealing to government to stay its hand on matters of religious faith, the bold assertion was made that man possessed a basic right to religious freedom. Accommodation had now become a matter of right.

Translating that right of religious freedom into practice leads us to Virginia, where the fight was long and hard but ultimately successful. Other states reflected the Virginia experience, and by the turn of the century only the two New England states, Connecticut and Massachusetts, still provided for governmental support of religion.

The contract theory of government in which the people retained certain rights provided the first philosophical justification for freedom of religion. As time progressed, other rationales for such freedom were offered, in part for the purpose of moving beyond the confines of Enlightenment thought. The hope for the millenium on earth, envisioned by some eighteenth century thinkers, ran into the intractibility of human nature and the complexity that made rational man seem a rather lifeless creature.

So, in this chapter, we are looking at the way in which matters of religion and government and religious liberty are wrapped up in larger concerns that stride from our beginnings as a nation in the latter eighteenth century up to the present.

We begin our chapter with some excerpts from Locke's influential political writing in which he sets the stage for American political thought (Reading 18). Although Thomas Jefferson in writing the Declaration of Independence (Reading 19) denied that he had consulted any book, his words justify the American revolutionary cause on the basis of then familiar concepts of the political rights of the American people.

Because the fight in Virginia enlisted both religious leaders and politicians, such as James Madison and Thomas Jefferson to the cause, we have included a number of sources that reflect the struggle (Readings 20 and 21). Since both Jefferson and Madison will be used repeatedly by observers of our past to gain some understanding of the relationship between religion and government in the United States, this introduction to their work seems quite necessary.

What is at stake in Virginia is whether or not the government should continue to use its power to support religion. The preferred position of the Episcopal Church did not survive the Revolution, but some political leaders, including Patrick Henry, saw nothing wrong with supporting churches on a relatively non-discriminatory basis. It is this proposal that Madison addresses (Reading 22), and his success in opposing the bill paves the way finally for the passage of Jefferson's Virginia Statute of Religious Liberty in 1786 (Reading 23).

Behind this experience in Virginia were not only political motives but principles as well. The assumption that among man's natural rights was one of religious freedom undergirds the success of the movement.

That a belief in the Christian God could continue to serve the cause of resistance to the denial of natural rights is well demonstrated by the abolitionist movement. An 1843 appeal by the black abolitionist, Henry Highland Garnet, who at age 9 escaped the bonds of slavery with his family, illustrates this crucial linkage (Reading 24).

Much nineteenth-century political thought, however, reflected a shift away from Locke's contractual base. For instance, John Stuart Mill, another English philosopher, sought to find protection for what were earlier called natural rights on a different philosophical base. Reflecting new intellectual currents, Mill argued from the position that individual liberty was useful for it encouraged the development of a person's potential, which, he reasoned, could only benefit the society as a whole. His eloquent defense of liberty, and especially religious liberty, is found here (Reading 25).

Confronting the chaos of world wars and the destruction of intellectual certainties that had anchored the past, twentieth century thinking fragmentized into many parts. New concerns cast doubts upon whether utility really justified liberty, especially in light of totalitarian ventures that suppressed individual liberty for the stated purpose of advancing the collective welfare.

Yet, with new threats to man's mind and even his ultimate survival, attempts were made to lay new foundations that would seek to undergird the liberties we take for granted. One such attempt has been made by John Rawls, John Cowles Professor of Philosophy at Harvard University, who has constructed his edifice upon the precept of justice as fairness. Seeing the utility argument of Mill bypassed by historical events, he returns to a version of the social compact theory. He treats religious liberty as a clear illustration of the value of his theory (Reading 26).

With these selections that span two centuries, you can see how the matter of religious liberty has been viewed within the larger context of individual freedom.

Reading 18: John Locke

Second Treatise on Government **(1689)**

To understand political power aright, and derive it from its original, we must consider what state all men are naturally in, and that is a state of perfect freedom to order their actions and dispose of their possessions and persons as they think fit, within the bounds of the law of nature, without asking leave, or depending upon the will of any other man.

A state also of equality, wherein all the power and jurisdiction is reciprocal, no one having more than another; there being nothing more evident than that creatures of the same species and rank, promiscuously born to all the same advantages of nature, and the use of the same faculties, should also be equal one amongst another without subordination or subjection, unless the Lord and Master of them all should by any manifest declaration of His will set one above another, and confer on him by an evident and clear appointment an undoubted right to dominion and sovereignty. . . .

But though this be a state of liberty, yet it is not a state of license; though man in that state has an uncontrollable liberty to dispose of his person or possessions, yet he has not liberty to destroy himself, or so much as any creature in his possession, but where some nobler use than its bare preservation calls for it. The state of nature has a law of nature to govern it, which obliges everyone; and reason, which is that law, teaches all mankind who will but consult it, that, being all equal and independent, no one ought to harm another in his life, health, liberty, or possessions. For men being all the workmanship of one omnipotent and infinitely wise Maker—all the servants of one sovereign Master, sent into the world by His order, and about His business—they are His property, whose workmanship they are, made to last during His, not one another's pleasure; and being furnished with like faculties, sharing all in one community of nature, there cannot be supposed any such subordination among us, that may authorize us to destroy one another, as if we were made for one another's uses, as the inferior ranks of creatures are for

ours. Everyone, as he is bound to preserve himself, and not to quit his station willfully, so, by the like reason, when his own preservation comes not in competition, ought he, as much as he can, to preserve the rest of mankind, and not, unless it be to do justice on an offender, take away or impair the life, or what tends to the preservation of the life, the liberty, health, limb, or goods of another. . . .

Men being, as has been said, by nature all free, equal, and independent, no one can be put out of this estate, and subjected to the political power of another, without his own consent, which is done by agreeing with other men to join and unite into a community for their comfortable, safe, and peaceable living one amongst another, in a secure enjoyment of their properties, and a greater security against any that are not of it. This any number of men may do, because it injures not the freedom of the rest; they are left as they were in the liberty of the state of nature. When any number of men have so consented to make one community or government, they are thereby presently incorporated, and make one body politic, wherein the majority have a right to act and conclude the rest. . . .

But though men when they enter into society give up the equality, liberty and executive power they had in the state of nature into the hands of the society, to be so far disposed of by the legislative as the good of the society shall require; yet it being only with an intention in everyone the better to preserve himself, his liberty and property (for no rational creature can be supposed to change his condition with an intention to be worse), the power of the society, or legislative constituted by them, can never be supposed to extend farther than the common good, but is obliged to secure everyone's property by providing against those three defects above-mentioned that made the state of nature so unsafe and uneasy. And so whoever has the legislative or supreme power of any commonwealth is bound to govern by established standing laws, promulgated and known to the people, and not by extemporary decrees; by indifferent and upright judges, who are to decide controversies by those laws; and to employ the force of the community at home only in the execution of such laws, or abroad, to prevent or redress foreign injuries, and secure the community from inroads and invasion. And all this to be directed to no other end but the peace, safety, and public good of the people.

Reading 19: *Declaration of Independence* (1776).

When, in the course of human events, it becomes necessary for one people to dissolve the political bands which have connected them with another, and to assume, among the powers of the earth, the separate and equal station to which the laws of nature and of nature's God entitle them, a decent respect to the opinions of mankind requires that they should declare the causes which impel them to the separation.

We hold these truths to be self-evident: That all men are created equal; that they are endowed by their Creator with certain unalienable rights; that among these are life, liberty, and the pursuit of happiness; that, to secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed; that whenever any form of government becomes destructive of these ends, it is the right of the people to alter or to abolish it, and to institute new government, laying its foundation on such principles, and organizing its powers in such form, as to them shall seem most likely to effect their safety and happiness. Prudence, indeed, will dictate that governments long established should not be changed for light and transient causes; and accordingly all experience hath shown that mankind are more disposed to suffer, while evils are sufferable, than to right themselves by abolishing the forms to which they are accustomed. But when a long train of abuses and usurpations, pursuing invariably the same object, evinces a design to reduce them under absolute despotism, it is their right, it is their duty, to throw off such government, and to provide new guards for their future security. Such has been the patient sufferance of these colonies; and such is now the necessity which constrains them to alter their former systems of government. The history of the present King of Great Britain is a history of repeated injuries and usurpations, all having in direct object the establishment of an absolute tyranny over these states. To prove this, let facts be submitted to a candid world. . . .

In every stage of these oppressions we have petitioned for redress in the most humble terms; our repeated petitions have been answered only by repeated injury. A prince, whose character is thus marked by every act which may define a tyrant, is unfit to be the ruler of a free people.

Nor have we been wanting in our attentions to our British brethren. We have warned them, from time to time, of attempts by their legislature to extend an unwar-

rantable jurisdiction over us. We have reminded them of the circumstances of our emigration and settlement here. We have appealed to their native justice and magnanimity; and we have conjured them, by the ties of our common kindred, to disavow these usurpations, which would inevitably interrupt our connections and correspondence. They, too, have been deaf to the voice of justice and of consanguinity. We must, therefore, acquiesce in the necessity which denounces our separation, and hold them, as we hold the rest of mankind, enemies in war, in peace friends.

We, therefore, the representatives of the United States of America, in General Congress assembled, appealing to the Supreme Judge of the world for the rectitude of our intentions, do, in the name and by the authority of the good people of these colonies, solemnly publish and declare, that these United Colonies are, and of right ought to be, FREE AND INDEPENDENT STATES; that they are absolved from all allegiance to the British crown, and that all political connection between them and the state of Great Britain is, and ought to be, totally dissolved; and that, as free and independent states, they have full power to levy war, conclude peace, contract alliances, establish commerce, and do all other acts and things which independent states may of right do. And for the support of this declaration, with a firm reliance on the protection of Divine Providence, we mutually pledge to each other our lives, our fortunes, and our sacred honor.

Reading 20: Memorial to General Assembly of Virginia from Presbytery of Hanover, October 24, 1776

The memorial of the Presbytery of Hanover humbly represents that your memorialists are governed by the same sentiments which have inspired the United States of America; and are determined that nothing in our power and influence shall be wanting to give success to their common cause. We would also represent that dissenters from the Church of England in this country have ever been desirous to conduct themselves as peaceable members of the civil government, for which reason they have hitherto submitted to several ecclesiastical burdens and restrictions that are inconsistent with equal liberty. But now when the many and grievous oppressions of our mother country have laid this continent under the necessity of casting off the yoke of tyranny and of forming independent governments upon equitable and liberal foundations, we flatter ourselves that we shall be free from all the encumbrances which a spirit of domination, prejudice, or bigotry has interwoven with most other political systems. This we are the more strongly encouraged to expect by the Declaration of Rights, so universally applauded for that dignity, firmness, and precision with which it delineates and asserts the privileges of society and the prerogatives of human nature, and which we embrace as the Magna Charta of our commonwealth that can never be violated without endangering the grand superstructure it was destined to sustain. Therefore, we rely upon this Declaration, as well as the justice of our honorable legislature, to secure us the free exercise of religion according to the dictates of our consciences; and we should fall short in our duty to ourselves, and the many and numerous congregations under our care, were we, upon this occasion, to neglect laying before you a state of the religious grievances under which we have hitherto labored that they no longer may be continued in our present form of government.

It is well known that in the frontier counties, which are justly supposed to contain a fifth part of the inhabitants of Virginia, the dissenters have borne the heavy burdens of purchasing glebes [lands], building churches, and supporting the established clergy where there are very few Episcopalians either to assist in bearing the expense or to reap the advantage; and that throughout the other parts of the country, there are also many thousands of zealous friends and defenders of our state who, besides the invidious and disadvantageous restrictions to which they have been subjected, annually pay large taxes to support an establishment from which their consciences and principles oblige them to dissent—all which are confessedly so many violations of their natural rights, and, in their consequences, a restraint upon freedom of inquiry and private judgment.

In this enlightened age and in a land where all of every denomination are united in the most strenuous efforts to be free, we hope and expect that our representatives will cheerfully concur in removing every species of religious, as well as civil, bondage. Certain it is that every argument for civil liberty gains additional strength when applied to liberty in the concerns of religion; and there is no argument in favor of establishing the Christian religion but what may be pleaded, with equal propriety, for establishing the tenets of Mohammed by those who believe the Alcoran; or if this be not true, it is at least impossible for the magistrate to adjudge the right of preference among the various sects that profess the Christian faith, without erecting a chair of infallibility, which would lead us back to the Church of Rome.

We beg leave farther to represent that religious establishments are highly injurious to the temporal interests of any community. Without insisting upon the ambition and the arbitrary practices of those who are favored by government, or the intriguing seditious spirit which is commonly excited by this as well as every other kind of oppression, such establishments greatly retard population, and consequently the progress of arts, sciences, and manufactories. Witness the rapid growth and improvements of the northern provinces compared with this. No one can deny that the more early settlement and the many superior advantages of our country would have invited multitudes of artificers, mechanics, and other useful members of society to fix their habitation among us, who have either remained in their place of nativity, or preferred worse civil governments and a more barren soil where they might enjoy the rights of conscience more fully than they had a prospect of doing it in this. From which we infer that Virginia might have now been the capital of America and a match for the British arms without depending on others for the necessaries of war, had it not been prevented by her religious establishment.

Neither can it be made to appear that the gospel needs any such civil aid. We rather conceive that when our blessed Savior declares His kingdom is not of this world, He renounces all dependence upon state power, and as His weapons are spiritual and were only designed to have influence on the judgment and heart of man, we are persuaded that if mankind were left in the quiet possession of their inalienable rights and privileges, Christianity, as in the days of the apostles, would continue to prevail and flourish in the greatest purity by its own native excellence and under the all-disposing providence of God.

We would humbly represent that the only proper objects of civil government are the happiness and protection of men in the present state of existence; the security of the life, liberty, and property of the citizens; and to restrain the vicious and encourage the virtuous by wholesome laws, equally extending to every individual. But that the duty which we owe our Creator, and the manner of discharging it, can only be directed by reason and conviction, and is nowhere cognizable but at the tribunal of the universal Judge.

Therefore, we ask no ecclesiastical establishments for ourselves; neither can we approve of them when granted to others. This indeed would be giving exclusive or separate emoluments or privileges to one set (or sect) of men, without any special public services to the common reproach and injury of every other denomination. And for the reasons recited, we are induced earnestly to entreat that all laws now in force in this commonwealth which countenance religious domination may be speedily repealed, that all of every religious sect may be protected in the full exercise of their several modes of worship and exempted from all taxes for the support of any church whatsoever further than what may be agreeable to their own private choice or voluntary obligation. This being done, all partial and invidious distinctions will be abolished, to the great honor and interest of the state; and everyone be left to stand or fall according to merit, which can never be the case so long as any one denomination is established in preference to others.

That the great Sovereign of the universe may inspire you with unanimity, wisdom, and resolution, and bring you to a just determination on all the important concerns before you, is the fervent prayer of your memorialists.

Reading 21: Thomas Jefferson

From *Notes on Virginia*, 1781-82

QUERY XVII
THE DIFFERENT RELIGIONS RECEIVED INTO THAT STATE

The first settlers in this country were emigrants from England, of the English Church, just at a point of time when it was flushed with complete victory over the religious of all other persuasions. Possessed, as they became of the powers of making, administering, and executing the laws, they showed equal intolerance in this country with their Presbyterian brethren, who had emigrated to the northern government. The poor Quakers were flying from persecution in England. They cast their eyes on these new countries as asylums of civil and religious freedom; but they found them free only for the reigning sect. Several acts of the Virginia assembly of 1659, 1662, and 1693, had made it penal in parents to refuse to have their children baptized; had prohibited the unlawful assembling of Quakers; had made it penal for any master of a vessel to bring a Quaker into the State; had ordered those already here, and such as should come thereafter, to be imprisoned till they should abjure the country; provided a milder punishment for their first and second return, but death for their third; had inhibited all persons from suffer-

ing their meetings in or near their houses, entertaining them individually, or disposing of books which supported their tenets. If no execution took place here, as did in New England, it was not owing to the moderation of the church, or spirit of the legislature, as may be inferred from the law itself; but to historical circumstances which have been handed down to us. The Anglicans retained full possession of the country about a century. Other opinions began to creep in, and the great care of the government to support their own church, having begotten an equal degree of indolence in its clergy, two-thirds of the people had become dissenters at the commencement of the present revolution. The laws, indeed, were still oppressive on them, but the spirit of the one party had subsided into moderation, and of the other had risen to a degree of determination which commanded respect.

The present state of our laws on the subject of religion is this. The convention of May, 1776, in their declaration of rights, declared it to be a truth, and a natural right, that the exercise of religion should be free; but when they proceeded to form on that declaration the ordinance of government, instead of taking up every principle declared in the bill of rights, and guarding it by legislative sanction, they passed over that which asserted our religious rights, leaving them as they found them. The same convention, however, when they met as a member of the general assembly in October, 1776, repealed all *acts of Parliament* which had rendered criminal the maintaining any opinions in matters of religion, the forbearing to repair to church, and the exercising any mode of worship, and suspended the laws giving salaries to the clergy, which suspension was made perpetual in October, 1779. Statutory oppressions in religion being thus wiped away, we remain at present under those only imposed by the common law, or by our own acts of assembly. At the common law, *heresy* was a capital offence, punishable by burning. Its definition was left to the ecclesiastical judges, before whom the conviction was ... circumscribed ... by declaring, that nothing should be deemed heresy, but what had been so determined by authority of the canonical scriptures, or by one of the four first general councils, or by other council, having for the grounds of their declaration the express and plain words of the scriptures. Heresy, thus circumscribed, being an offence against the common law, our act of assembly of October, 1777, gives cognizance of it to the general court, by declaring that the jurisdiction of that court shall be general in all matters at the common law.... By our own act of assembly... ,if a person brought up in the Christian religion denies the being of a God, or the Trinity, or asserts there are more gods than one, or denies the Christian religion to be true, or the scriptures to be of divine authority, he is punishable on the first offence by incapacity to hold any office or employment ecclesiastical, civil, or military; on the second by disability to sue, to take any gift or legacy, to be guardian, executor, or administrator, and by three years' imprisonment without bail. A father's right to the custody of his own children being founded in law on his right of guardianship, this being taken away, they may of course be severed from him, and put by the authority of a court into more orthodox hands. This is a summary view of that religious slavery under which a people have been willing to remain, who have lavished their lives and fortunes for the establishment of their civil freedom. The error seems not sufficiently eradicated, that the operations of the mind, as well as the acts of the body, are subject to the coercion of the laws. But our rulers can have no authority over such natural rights, only as we have submitted to them. The rights of conscience we never submitted, we could not submit. We are answerable for them to our God. The legitimate powers of government extend to such acts only as are injurious to others. But it does me no injury for my neighbor to say there are twenty gods, or no God. It neither picks my pocket nor breaks my leg. If it be said, his testimony in a court of justice cannot be relied on, reject it then, and be the stigma on him. Constraint may make him worse by making him a hypocrite, but it will never make him a truer man. It may fix him obstinately in his errors, but will not cure them. Reason and free inquiry are the only effectual agents against error. Give a loose to them, they will support the true religion by bringing every false one to their tribunal, to the test of their investigation. They are the natural enemies of error, and of error only. Had not the Roman government permitted free inquiry, Christianity could never have been introduced. Had not free inquiry been indulged at the era of the Reformation, the corruptions of Christianity could not have been purged away. If it be restrained now, the present corruptions will be protected, and new ones encouraged. Was the government to prescribe to us our medicine and diet, our bodies would be in such keeping as our souls are now. Thus in France the emetic was once forbidden as a medicine, the potato as an article of food. Government is just as infallible, too, when it fixes systems in physics. Galileo was sent to the Inquisition for affirming that the earth was a sphere; the government had declared it to be as flat as a trencher, and Galileo was obliged to abjure his error. This error, however, at length prevailed, the earth became a globe, and Descartes declared it was whirled round its axis by a vortex. The government in which he lived was wise enough to see that this was no question of civil jurisdiction, or we should all

have been involved by authority in vortices. In fact, the vortices have been exploded, and the Newtonian principle of gravitation is now more firmly established, on the basis of reason, than it would be were the government to step in, and to make it an article of necessary faith. Reason and experiment have been indulged, and error has fled before them. It is error alone which needs the support of government. Truth can stand by itself. Subject opinions to coercion: whom will you make your inquisitors? Fallible men; men governed by bad passions, by private as well as public reasons. And why subject it to coercion? To produce uniformity. But is uniformity of opinion desirable? No more than of face and stature. Introduce the bed of Procrustes then, as there is danger that the large men may beat the small, make us all of a size, by lopping the former and stretching the latter. Difference of opinion is advantageous in religion. The several sects perform the office of a *censor morum* [moral censor] over each other. Is uniformity attainable? Millions of innocent men, women, and children, since the introduction of Christianity, have been burnt, tortured, fined, imprisoned; yet we have not advanced one inch towards uniformity. What has been the effect of coercion? To make one half the world fools, and the other half hypocrites. To support roguery and error all over the earth. Let us reflect that it is inhabited by a thousand millions of people. That these profess probably a thousand different systems of religion. That ours is but one of that thousand. That if there be but one right, and ours that one, we should wish to see the nine hundred and ninety-nine wandering sects gathered into the fold of truth. But against such a majority we cannot effect this by force. Reason and persuasion are the only practicable instruments. To make way for these, free inquiry must be indulged; and how can we wish others to indulge it while we refuse it ourselves. But every State, says an inquisitor, has established some religion. No two, say I, have established the same. Is this a proof of the infallibility of establishments? Our sister States of Pennsylvania and New York, however, have long subsisted without any establishment at all. The experiment was new and doubtful when they made it. It has answered beyond conception. They flourish infinitely. Religion is well supported; of various kinds, indeed, but all good enough; all sufficient to preserve peace and order; or if a sect arises, whose tenets would subvert morals, good sense has fair play, and reasons and laughs it out of doors, without suffering the State to be troubled with it. They do not hang more malefactors than we do. They are not more disturbed with religious dissensions. On the contrary, their harmony is unparalleled, and can be ascribed to nothing but their unbounded tolerance, because there is no other circumstance in which they differ from every nation on earth. They have made the happy discovery, that the way to silence religious disputes, is to take no notice of them. Let us too give this experiment fair play, and get rid, while we may, of those tyrannical laws. It is true, we are as yet secured against them by the spirit of the times. I doubt whether the people of this country would suffer an execution for heresy, or a three years' imprisonment for not comprehending the mysteries of the Trinity. But is the spirit of the people an infallible, a permanent reliance? Is it government? Is this the kind of protection we receive in return for the rights we give up? Besides, the spirit of the times may alter, will alter. Our rulers will become corrupt, our people careless.... It can never be too often repeated, that the time for fixing every essential right on a legal basis is while our rulers are honest, and ourselves united. From the conclusion of this war we shall be going down hill. It will not then be necessary to resort every moment to the people for support. They will be forgotten, therefore, and their rights disregarded. They will forget themselves, but in the sole faculty of making money, and will never think of uniting to effect a due respect for their rights. The shackles, therefore, which shall not be knocked off at the conclusion of this war, will remain on us long, will be made heavier and heavier, till our rights shall revive or expire in a convulsion.

Reading 22: James Madison

"A Memorial and Remonstrance on the Religious Rights of Man," 1784

To the Honorable the General Assembly of the State of Virginia

We, the subscribers, citizens of the said commonwealth, having taken into serious consideration a bill printed by order of the last session of the general assembly, entitled "A bill for establishing a provision for teachers of the Christian religion," and conceiving that the same, if finally armed with the sanctions of a law, will be a dangerous abuse of power, are bound, as faithful members of a free state, to remonstrate against the said bill–

Because we hold it for a "fundamental and undeniable truth," that religion, or the duty which we owe to our creator, and the manner of discharging it, can be directed only by reason and conviction, not by force or violence. The religion, then, of every man, must be left to the conviction and conscience of every man; and it is the right of every man to exercise it as these may dictate. This right is, in its nature, an unalienable right. It is unalienable, because the opinions of men, depending only on the evidence contemplated in their own minds, cannot follow the dictates of other men; it is unalienable, also, because what is here a right towards men, is a duty towards the creator. It is the duty of every man to render the creator such homage, and *such only*, as he believes to be acceptable to him; this duty is precedent, both in order of time and degree of obligation, to the claims of civil society. Before any man can be considered as a member of civil society, he must be considered as a subject of the governor of the universe; and if a member of civil society, who enters into any subordinate association, must always do it with a reservation of his duty to the general authority, much more must every man who becomes a member of any particular civil society do it *with the saving his allegiance to the universal sovereign*. We maintain, therefore, that in matters of religion no man's right is abridged by the institution of civil society; and that religion is wholly exempt from its cognizance. True it is, that no other rule exists, by which any question which may divide society can be ultimately determined, but the will of the majority; but it is also true, that the majority may trespass on the rights of the minority.

Because, if religion be exempt from the authority of the society at large, still less can it be subject to that of the legislative body. The latter are but the creatures and vicegerents of the former. Their jurisdiction is both derivative and limited. It is limited with regard to the coordinate departments: more necessarily is it limited with regard to the constituents. The preservation of a free government requires not merely that the metes and bounds which separate each department of power be universally maintained; but more especially, that neither of them be suffered to overleap the great barrier which defends the rights of the people. The rulers who are guilty of such an encroachment, exceed the commission from which they derive their authority, and are tyrants. The people who submit to it are governed by laws made neither by themselves, nor by an authority derived from them and are slaves.

Because it is proper to take alarm at the first experiment on our liberties. We hold this prudent jealousy to be the first duty of citizens, and one of the noblest characteristics of the late revolution. The freemen of America did not wait till usurped power had strengthened itself by exercise, and entangled the question in precedents. They saw all the consequences by denying the principle. We revere this lesson too much soon to forget it. Who does not see that the same authority which can establish Christianity, in exclusion of all other religions, may establish, with the same ease, any particular sect of Christians, in exclusion of all other sects? That the same authority that can call for each citizen to contribute three pence only of his property for the support of only one establishment, may force him to conform to any one establishment, in all cases whatsoever?

Because the bill violates that equality which ought to be the basis of every law, and which is more indispensable in proportion as the validity or expediency of any law is more liable to be impeached. If "all men by nature are equally free and independent," all men are to be considered as entering into society on equal conditions, as relinquishing no more, and, therefore, retaining no less, one than another, of their rights. Above all, they are to be considered as retaining an "equal right to the free exercise of religion, according to the dictates of conscience." While we assert for ourselves a freedom to embrace, to profess, and to observe, the religion which we believe to be of divine origin, we cannot deny an equal freedom to those whose minds have not yet yielded to the evidence which has convinced us. If this freedom be abused, it is an offence against God, *not against man*: to God, therefore, *not to man*, must an account of it be rendered. As the bill violates equality by subjecting some to peculiar burdens, so it violates the same principle by granting to others peculiar exemptions. Are the Quakers and Menonists the only sects who think compulsive support of their religions unnecessary and unwarrantable? Can their piety alone be entrusted with the care of public worship? Ought their religions to be endowed, above all others, with extraordinary privileges, by which proselytes may be enticed from all others? We think too favorably of the justice and good sense of these denominations to believe that they either covet preeminence over their fellow citizens, or that they will be seduced by them from the common opposition to the measure.

Because the bill implies, either that the civil magistrate is a competent judge of truth, or that he may employ religion as an engine of civil policy. The first is an arrogant pretension, falsified by the contradictory opinions of rulers in all ages, and throughout the world: the second is an unhallowed perversion of the means of salvation.

Because the establishment proposed by the bill is not requisite for the support of the Christian religion. To say that it is, is a contradiction to the Christian religion itself; for every page of it disavows a dependence on the powers of this world: it is a contradiction to fact; for it is known that this religion both existed and flourished, not only without the support of human laws, but in spite of every opposition from them; and not only during the period of miraculous aid, but long after it had been left to its own evidence, and the ordinary care of Providence. Nay, it is a contradiction in terms; for a religion not invented by human policy must have pre-existed and been supported before it was established by human policy. It is, moreover, to weaken in those who profess this religion a pious confidence in its innate excellence, and the patronage of its author; and to foster in those who still reject it, a suspicion that its friends are too conscious of its fallacies to trust it to its own merits.

Because experience witnesseth that ecclesiastical establishments, instead of maintaining the purity and efficacy of religion, have had a contrary operation. During almost fifteen centuries has the legal establishment of Christianity been on trial. What have been its fruits? More or less, in all places, pride and indolence in the clergy; ignorance and servility in the laity; in both, superstition, bigotry, and persecution. Enquire of the teachers Christianity for the ages in which it appeared in its greatest lustre; those of every sect point to the ages prior to its incorporation with civil policy. Propose a restoration of this primitive state, in which its teachers depended on the voluntary rewards of their flocks; many of them predict its downfall. On which side ought their testimony to have the greatest weight, when for, or when against, their interest?

Because the establishment in question is not necessary for the support of civil government. If it be urged as necessary for the support of civil government only as it is a means of supporting religion and if it be not necessary for the latter purpose, it cannot be necessary for the former. If religion be not within the cognizance of civil government, how can its legal establishment be said to be necessary to civil government? What influences, in fact, have ecclesiastical establishments had on civil society? In some instances they have been seen to erect a spiritual tyranny on the ruins of civil authority, in many instances they have been seen upholding the thrones of political tyranny; in no instance have they been seen the guardians of the liberties of the people. Rulers who wished to subvert the public liberty may have found an established clergy convenient auxiliaries. A just government, instituted to secure and perpetuate it, needs them not. Such a government will be best supported by protecting every citizen in the enjoyment of his religion with the same equal hand that protects his person and property; by neither invading the equal rights of any sect, nor suffering any sect to invade those of another.

Because the proposed establishment is a departure from that generous policy which, offering an asylum to the persecuted and oppressed of every nation and religion, promised a lustre to our country, and an accession to the number of its citizens.... Instead of holding forth an asylum to the persecuted, it is itself a signal of persecution. It degrades from the equal rank of citizens all those whose opinions in religion do not bend to those of the legislative authority. Distant as it may be, in its present form, from the inquisition, it differs only in degree. The one is the *first* step, the other the *last*, in the *career of intolerance*. The magnanimous sufferer under this cruel scourge in foreign regions, must view the bill as a beacon on our coast, warning him to seek some other haven, where liberty and philanthropy, in their due extent, may offer a more certain repose from his troubles.

Because it will have a like tendency to banish our citizens. The allurements presented by other situations are every day thinning their numbers. To superadd a fresh motive to emigration, by revoking the liberty which they now enjoy, would be the same species of folly which has dishonored and depopulated flourishing kingdoms.

Because it will destroy the moderation and harmony which the forbearance of our laws to intermeddle with religion has produced among its several sects. Torrents of blood have been spilt in the world in vain attempts of the secular arm to extinguish religious discord, by proscribing all differences in religious opinions. Time, at length, has revealed the true remedy. Every relaxation of narrow and rigorous policy, wherever it has been tried, has been found to assuage the disease. The American theatre has exhibited proofs, that equal and complete liberty, if it does not wholly eradicate it, sufficiently destroys its malignant influence on the health and prosperity of the state. If, with the salutary effects of this system under our own eyes, we begin to contract the bounds of religious freedom, we know no name that will too severely reproach our folly. At least, let warning be taken at the first fruits of the threatened innovation. The very appearance of the bill has transformed that "Christian forbearance, love, and charity," which of late mutually prevailed, into animosities and jealousies, which may not soon be appeased. What mischiefs may not be dreaded, should this enemy to the public quiet be armed with the force of a law!

Because the policy of the bill is adverse to the diffusion of the light of Christianity. The first wish of

those who enjoy this precious gift ought to be, that it may be imparted to the whole race of mankind. Compare the number of those who have as yet received it, with the number still remaining under the dominion of false religions, and how small is the former! Does the policy of the bill tend to lessen the disproportion? No: it at once discourages those who are strangers to the light of revelation from coming into the region of it: countenances, by example, the nations who continue in darkness, in shutting out those who might convey it to them. Instead of levelling, as far as possible, every obstacle to the victorious progress of truth, the bill, with an ignoble and unchristian timidity, would circumscribe it with a wall of defence against the encroachments of error.

Because attempts to enforce by legal sanctions acts obnoxious to so great a proportion of citizens, tend to enervate the laws in general, and to slacken the bands of society. If it be difficult to execute any law which is not generally deemed necessary or salutary, what must be the case where it is deemed invalid and dangerous? And what may be the effect of so striking an example of impotency in the government on its general authority?

Because a measure of such general magnitude and delicacy ought not to be imposed, without the clearest evidence that it is called for by a majority of citizens: and no satisfactory method is yet proposed, by which the voice of the majority in this case may be determined, or its influence secured. "The people of the respective counties are, indeed, requested to signify their opinion, respecting the adoption of the bill, to the next sessions of assembly;" but the representation must be made equal before the voice either of the representatives or the counties will be that of the people. Our hope is, that neither of the former will, after due consideration, espouse the dangerous principle of the bill. Should the event disappoint us, it will still leave us in full confidence that a fair appeal to the latter will reverse the sentence against our liberties.

Because, finally, "the equal right of every citizen to the free exercise of his religion, according to the dictates of conscience," is held by the same tenure with all our other rights. If we recur to its origin, it is equally the gift of nature; if we weigh its importance, it cannot be less dear to us; if we consult the "declaration of those rights which pertain to the good people of Virginia, as the basis and foundation of government," it is enumerated with equal solemnity, or, rather, studied emphasis.

Either, then, we must say that the will of the legislature is the only measure of their authority, and that, in the plenitude of this authority they may sweep away all our fundamental rights; or, that they are bound to leave this particular right untouched and sacred: either we must say that they may control the freedom of the press, may abolish the trial by jury, may swallow up the executive and judiciary powers of the state; nay, that they may despoil us of our right of suffrage, and erect themselves into an independent and hereditary assembly: or, we must say, that they have no authority to enact into law the bill under consideration. We, the subscribers, say, that the general assembly of this commonwealth have no such authority; and that no effort may be omitted, on our part, against so dangerous an usurpation, we oppose to it in this remonstrance—earnestly praying, as we are in duty bound, that the SUPREME LAWGIVER OF THE UNIVERSE, by illuminating those to whom it is addressed, may, on the one hand, turn their councils from every act which affronts his holy prerogative, or violates the trust committed to them; and, on the other, guide them into every measure that may be worthy of his blessing, may redound to their own praise, and may establish more firmly the liberties of the people, and the prosperity and happiness of the commonwealth.

Reading 23: Thomas Jefferson

Virginia Statute of Religious Liberty, 1786

An Act for establishing Religious Freedom.

I. Whereas Almighty God hath created the mind free; that all attempts to influence it by temporal punishments or burthens, or by civil incapacitations, tend only to beget habits of hypocrisy and meanness, and are a departure from the plan of the Holy author of our religion, who being Lord both of body and mind, yet chose not to propagate it by coercions on either, as was in his Almighty power to do; that the impious presumption of legislators and rulers, civil as well as ecclesiastical, who being themselves but fallible and uninspired men, have assumed dominion over the faith of others, setting up their own opinions and modes of thinking as the only true and infallible, and as such endeavouring to impose them on others, hath established and maintained false religions over the greatest part of the world, and through all time; that to compel a man to furnish contributions of money for the

propagation of opinions which he disbelieves, is sinful and tyrannical; that even the forcing him to support this or that teacher of his own religious persuasion, is depriving him of the comfortable liberty of giving his contributions to the particular pastor whose morals he would make his pattern, and whose powers he feels most persuasive to righteousness, and is withdrawing from the ministry those temporary rewards, which proceeding from an approbation of their personal conduct, are an additional incitement to earnest and unremitting labours for the instruction of mankind; that our civil rights have no dependence on our religious opinions, any more than our opinions in physics or geometry; that therefore the proscribing any citizen as unworthy the public confidence by laying upon him an incapacity of being called to offices of trust and emolument, unless he profess or renounce this or that religious opinion, is depriving him injuriously of those privileges and advantages to which in common with his fellow-citizens he has a natural right, that it tends only to corrupt the principles of that religion it is meant to encourage, by bribing with a monopoly of worldly honours and emoluments, those who will externally profess and conform to it; that though indeed these are criminal who do not withstand such temptation, yet neither are those innocent who lay the bait in their way; that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy, which at once destroys all religious liberty, because he being of course judge of that tendency will make his opinions the rule of judgment, and approve or condemn the sentiments of others only as they shall square with or differ from his own; that it is time enough for the rightful purposes of civil government, for its officers to interfere when principles break out into overt acts against peace and good order; and finally, that truth is great and will prevail if left to herself, that she is the proper and sufficient antagonist to error, and has nothing to fear from the conflict, unless by human interposition disarmed of her natural weapons, free argument and debate, errors ceasing to be dangerous when it is permitted freely to contradict them.

II. *Be it enacted by the General Assembly*, that no man shall be compelled to frequent or support any religious worship, place or ministry whatsoever, nor shall be enforced, restrained, molested, or burthened in his body or goods, nor shall otherwise suffer on account of his religious opinions or belief; but that all men shall be free to profess, and by argument to maintain, their opinion in matters of religion, and that the same shall in no wise diminish, enlarge or affect their civil capacities.

III. And though we well know that this assembly, elected by the people for the ordinary purposes of legislation only, have no power to restrain the acts of succeeding assemblies, constituted with powers equal to our own, and that therefore to declare this act to be irrevocable would be of no effect in law; yet as we are free to declare, and do declare, that the rights hereby asserted are of the natural rights of mankind, and that if any act shall hereafter be passed to repeal the present, or to narrow its operation, such act will be an infringement of natural right.

Reading 24: Henry Highland Garnet

"Address to the Slaves of the United States of America," (1843)

Two hundred and twenty-seven years ago, the first of our injured race were brought to the shores of America. They came not with glad spirits to select their homes, in the New World. They came not with their own consent, to find an unmolested enjoyment of the blessings of this fruitful soil. The first dealings which they had with men calling themselves Christians, exhibited to them the worst features of corrupt and sordid hearts; and convinced them that no cruelty is too great, no villainy, and no robbery too abhorrent for even enlightened men to perform, when influence by avarice, and lust. Neither did they come flying upon the wings of Liberty, to a land of freedom. But, they came with broken hearts, from their beloved native land, and were doomed to unrequited toil, and deep degradation. Nor did the evil of their bondage end at their emancipation by death. Succeeding generations inherited their chains, and millions have come from eternity into time, and have returned again to the world of spirits, cursed, and ruined by American Slavery.

The propagators of the system, or their immediate ancestors very soon discovered its growing evil, and its tremendous wickedness, and secret promises were made to destroy it. The gross inconsistency of a people holding slaves, who had themselves "ferried o'er the wave," for freedom's sake, was too apparent to be entirely overlooked. The voice of Freedom cried, "emancipate your Slaves." Humanity supplicated with tears, for the deliverance of

the children of Africa. Wisdom urged her solemn plea. The bleeding captive plead his innocence, and pointed to Christianity who stood weeping at the cross. Jehovah frowned upon the nefarious institution, and thunderbolts, red with vengeance, struggled to leap forth to blast the guilty wretches who maintained it. But all was vain. Slavery had stretched its dark wings of death over the land, the Church stood silently by—the priests prophesied falsely, and the people loved to have it so. Its throne is established, and now it reigns triumphantly.

Nearly three millions of your fellow citizens, are prohibited by law, and public opinion, (which in this country is stronger than law), from reading the Book of Life. Your intellect has been destroyed as much as possible, and every ray of light they have attempted to shut out from your minds. The oppressors themselves have become involved in the ruin. They have become weak, sensual, and rapacious. They have cursed you—they have cursed themselves—they have cursed the earth which they have trod. In the language of a Southern statesman, we can truly say, "even the wolf, driven back long since by the approach of man, now returns after the lapse of a hundred years, and howls amid the desolations of slavery."

The colonists threw the blame upon England. They said that the mother country entailed the evil upon them, and that they would rid themselves of it if they could. The world thought they were sincere, and the philanthropic pitied them. But time soon tested their sincerity. In a few years, the colonists grew strong and severed themselves from the British Government. Their Independence was declared, and they took their station among the sovereign powers of the earth. The declaration was a glorious document. Sages admired it, and the patriotic of every nation reverenced the Godlike sentiments which it contained. When the power of Government returned to their hands, did they emancipate the slaves? No; they rather added new links to our chains. Were they ignorant of the principles of Liberty? Certainly they were not. The sentiments of their revolutionary orators fell in burning eloquence upon their hearts, and with one voice they cried, LIBERTY OR DEATH. O, what a sentence was that! It ran from soul to soul like electric fire, and nerved the arm of thousands to fight in the holy cause of Freedom. Among the diversity of opinions that are entertained in regard to physical resistance, there are but a few found to gainsay that stern declaration. We are among those who do not.

SLAVERY! How much misery is comprehended in that single word. What mind is there that does not shrink from its direful effects? Unless the image of God is obliterated from the soul, all men cherish the love of Liberty. The nice discerning political economist does not regard the sacred right, more than the untutored African who roams in the wilds of Congo. Nor has the one more right to the full enjoyment of his freedom than the other. In every man's mind the good seeds of liberty are planted, and he who brings his fellow down so low, as to make him contented with a condition of slavery, commits the highest crime against God and man. Brethren, your oppressors aim to do this. They endeavor to make you as much like brutes as possible. When they have blinded the eyes of your mind—when they have embittered the sweet waters of life—when they have shut out the light which shines from the words of God—then, and not till then has American slavery done its perfect work.

TO SUCH DEGRADATION IT IS SINFUL IN THE EXTREME FOR YOU TO MAKE VOLUNTARY SUBMISSION. The divine commandments, you are in duty bound to reverence, and obey. If you do not obey them you will surely meet with the displeasure of the Almighty He requires you to love him supremely, and your neighbor as yourself—to keep the Sabbath day holy—to search the Scriptures—and bring up your children with respect for his laws, and to worship no other God but him. But slavery sets all these at naught, and hurls defiance in the face of Jehovah. The forlorn condition in which you are placed does not destroy your moral obligation to God. You are not certain of Heaven, because you suffer yourselves to remain in a state of slavery, where you cannot obey the commandments of the Sovereign of the universe. If the ignorance of slavery is a passport to heaven, then it is a blessing, and no curse, and you should rather desire its perpetuity than its abolition. God will not receive slavery, nor ignorance, nor any other state of mind, for love, and obedience to him. Your condition does not absolve you from your moral obligation. The diabolical injustice by which your liberties are cloven down, NEITHER GOD, NOR ANGELS, OR JUST MEN, COMMAND YOU TO SUFFER FOR A SINGLE MOMENT. THEREFORE IT IS YOUR SOLEMN AND IMPERATIVE DUTY TO USE EVERY MEANS, BOTH MORAL, INTELLECTUAL, AND PHYSICAL, THAT PROMISE SUCCESS. If a band of heathen men should attempt to enslave a race of Christians, and to place their children under the influence of some false religion, surely, heaven would frown upon the men who would not resist such aggression, even to death. If, on the other hand, a band of Christians should attempt to enslave a race of heathen men and to entail slavery upon them, and to keep them in heathenism in the midst of Christianity, the God of heaven would smile upon every effort which the injured might make to disenthral themselves.

Brethren, it is as wrong for your lordly oppressors to keep you in slavery, as it was for the man thief to steal our ancestors from the coast of Africa. You should therefore now use the same manner of resistance, as would have been just in our ancestors, when the bloody foot prints for the first remorseless soul thief was placed upon the shores of our fatherland. The humblest peasant is as free in the sight of God, as the proudest monarch that ever swayed a sceptre. Liberty is a spirit sent out from God, and like its great Author, is no respector of persons.

Brethren, the time has come when you must act for yourselves. It is an old and true saying, that "if hereditary bondmen would be free, they must themselves strike the blow." You can plead your own cause, and do the work of emancipation better than any others. The nations of the old world are moving in the great cause of universal freedom, and some of them at least, will ere long, do you justice. The combined powers of Europe have placed their broad seal of disapprobation upon the African slave trade. But in the slave holding parts of the United States, the trade is as brisk as ever. They buy and sell you as though you were brute beasts. The North has done much—her opinion of slavery in the abstract is known. But in regard to the South, we adopt the opinion of the New York Evangelist—"We have advanced so far, that the cause apparently waits for a more effectual door to be thrown open than has been yet." We are about to point you to that more effectual door. Look around you, and behold the bosoms of your loving wives, heaving with untold agonies! Hear the cries of your poor children! Remember the stripes your father bore. Think of the torture and disgrace of your noble mothers. Think of your wretched sisters, loving virtue and purity, as they are driven into concubinage, and are exposed to the unbridled lusts of incarnate devils. Think of the undying glory that hangs around the ancient name of Africa:—and forget not that you are native-born American citizens, and as such, you are justly entitled to all the rights that are granted to the freest. Think how many tears you have poured out upon the soil which you have cultivated with unrequited toil, and enriched with your blood; and then go to your lordly enslavers, and tell them plainly, that YOU ARE DETERMINED TO BE FREE. Appeal to their sense of justice, and tell them that they have no more right to oppress you, than you have to enslave them. Entreat them to remove the grievous burdens which they have imposed upon you, and to remunerate you for your labor. Promise them renewed diligence in the cultivation of the soil, if they will render to you an equivalent for your services. Point them to the increase of happiness and prosperity in the British West Indies, since the act of Emancipation. Tell them in language which they cannot misunderstand, of the exceeding sinfulness of slavery, and of a future judgment, and of the righteous retributions of an indignant God. Inform them that all you desire, is FREEDOM, and that nothing else will suffice. Do this, and for ever after cease to toil for the heartless tyrants, who give you no other reward but stripes and abuse. If they then commence the work of death, they, and not you, will be responsible for the consequences. You had far better all die—*die immediately*, than live slaves, and entail your wretchedness upon your posterity. If you would be free in this generation, here is your only hope. However much you and all of us may desire it, there is not much hope of Redemption without the shedding of blood. If you must bleed, let it all come at once—rather, *die freemen, than live to be slaves*. It is impossible, like the children of Israel, to make a grand Exodus from the land of bondage. THE PHARAOHS ARE ON BOTH SIDES OF THE BLOOD-RED WATERS! You cannot remove en masse to the dominions of the British Queen—nor can you pass through Florida, and overrun Texas, and at last find peace in Mexico. The propagators of American slavery are spending their blood and treasure, that they may plant the black flag in the heart of Mexico, and riot in the halls of the Montezumas. In the language of the Rev. Robert Hall, when addressing the volunteers of Bristol, who were rushing forth to repel the invasion of Napoleon, who threatened to lay waste the fair homes of England, "Religion is too much interested in your behalf, not to shed over you her most gracious influences."

You will not be compelled to spend much time in order to become inured to hardships. From the first moment that you breathed the air of heaven, you have been accustomed to nothing else but hardships. The heroes of the American Revolution were never put upon harder fare, than a peck of corn, and a few herrings per week. You have not become enervated by the luxuries of life. Your sternest energies have been beaten out upon the anvil of severe trial. Slavery has done this, to make you subservient to its own purposes; but it has done more than this, it has prepared you for any emergency. If you receive good treatment, it is what you could hardly expect; if you meet with pain, sorrow, and even death, these are the common lot of the slaves.

Fellow men! patient sufferers! behold your dearest rights crushed to the earth! See your sons murdered, and your wives, mothers, and sisters, doomed to prostitution! In the name of the merciful God! and by all that life is worth, let it no longer be a debateable question, whether it is better to choose LIBERTY or DEATH!

In 1882, Denmark Veazie, of South Carolina, formed a plan for the liberation of his fellow men. In the whole history of human efforts to overthrow slavery, a more complicated and tremendous plan was never formed. He was betrayed by the treachery of his own people, and died a martyr to freedom. Many a brave hero fell, but History, faithful to her high trust, will transcribe his name on the same monument with Moses, Hampden, Tell, Bruce, and Wallace, Touissaint L'Overteur, Lafayette and Washington. That tremendous movement shook the whole empire of slavery. The guilty soul thieves were overwhelmed with fear. It is a matter of fact, that at that time, and in consequence of the threatened revolution, the slave states talked strongly of emancipation. But they blew but one blast of the trumpet of freedom, and then laid it aside. As these men became quiet, the slaveholders ceased to talk about emancipation: and now, behold your condition to-day! Angels sigh over it, and humanity has long since exhausted her tears in weeping on your account!

The patriotic Nathaniel Turner followed Denmark Veazie. He was goaded to desperation by wrong and injustice. By Despotism, his name has been recorded on the list of infamy, but future generations will number him among the noble and brave.

Next arose the immortal Joseph Cinque, the hero of the Amistad. He was a native African, and by the help of God he emancipated a whole ship-load of his fellow men on the high seas. And he now sings of liberty on the sunny hills of Africa, and beneath his native palm trees, where he hears the lion roar, and feels himself as free as that king of the forest. Next arose Madison Washington, that bright star of freedom, and took his station in the constellation of freedom. He was a slave on board the brig Creole, of Richmond, bound to New Orleans, that great slave mart, with a hundred and four others. Nineteen struck for liberty or death. But one life was taken, and the whole were emancipated, and the vessel was carried into Nassau, New Providence. Noble men! Those who have fallen in freedom's conflict, their memories will be cherished by the truehearted, and the God-fearing, in all future generations; those who are living, their names are surrounded by a halo of glory.

We do not advise you to attempt a revolution with the sword, because it would be INEXPEDIENT. Your numbers are too small, and moreover the rising spirit of the age, and the spirit of the gospel, are opposed to war and bloodshed. But from this moment cease to labor for tyrants who will not remunerate you. Let every slave throughout the land do this, and the days of slavery are numbered. You cannot be more oppressed than you have been—you cannot suffer greater cruelties than you have already. RATHER DIE FREEMEN, THAN LIVE TO BE SLAVES. Remember that you are THREE MILLIONS.

It is in your power so to torment the God-cursed slaveholders, that they will be glad to let you go free. If the scale was turned, and black men were the masters, and white men the slaves, every destructive agent and element would be employed to lay the oppressor low. Danger and death would hang over their heads day and night. Yes, the tyrants would meet with plagues more terrible than those of Pharaoh. But you are a patient people. You act as though you were made for the special use of these devils. You act as though your daughters were born to pamper the lusts of your masters and overseers. And worse than all, you tamely submit, while your lords tear your wives from your embraces, and defile them before your eyes. In the name of God we ask, are you men? Where is the blood of your fathers? Has it all run out of your veins? Awake, awake; millions of voices are calling you! Your dead fathers speak to you from their graves. Heaven, as with a voice of thunder, calls on you to arise from the dust.

Let your motto be RESISTANCE! RESISTANCE! RESISTANCE!—No oppressed people have ever secured their liberty without resistance. What kind of resistance you had better make, you must decide by the circumstances that surround you, and according to the suggestion of expediency. Brethren, adieu. Trust in the living God. Labor for the peace of the human race, and remember that you are three millions.

Reading 25: John Stuart Mill

***On Liberty* (1859)**

. . . The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a

civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him, or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him, must be calculated to produce evil to some one else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign....

It is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the larger sense, grounded on the permanent interests of man as a progressive being. Those interests, I contend, authorize the subjection of individual spontaneity to external control, only in respect to those actions of each, which concern the interest of other people. If any one does an act hurtful to others, there is a prima facie case for punishing him, by law, or, where legal penalties are not safely applicable, by general disapprobation. There are also many positive acts for the benefit of others, which he may rightfully be compelled to perform; such as, to give evidence in a court of justice; to bear his fair share in the common defence, or in any other joint work necessary to the interest of the society of which he enjoys the protection; and to perform certain acts of individual beneficence, such as saving a fellow creature's life, or interposing to protect the defenceless against ill-usage, things which whenever it is obviously a man's duty to do, he may rightfully be made responsible to society for not doing. A person may cause evil to others not only by his actions but by his inaction, and in either case he is justly accountable to them for the injury. The latter case, it is true, requires a much more cautious exercise of compulsion than the former. To make any one answerable for doing evil to others, is the rule; to make him answerable for not preventing evil, is, comparatively speaking, the exception.

But there is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived consent and participation. When I say only himself, I mean directly, and in the first instance: for whatever affects himself, may affect others through himself; and the objection which may be grounded on this contingency will receive consideration in the sequel. This, then, is the appropriate region of human liberty. It comprises first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived.

No society in which these liberties are not, on the whole, respected is free, whatever may be its form of government; and none is completely free in which they do not exist absolute and unqualified. The only freedom which deserves the name, is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it. Each is the proper guardian of his own health, whether bodily, or mental and spiritual. Mankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.

Though this doctrine is anything but new, and to some persons, may have the air of a truism, there is no doctrine which stands more directly opposed to the general tendency of existing opinion and practice. Society has expended fully as much effort in the attempt (according to its lights) to compel people to conform to its notions of personal, as of social excellence. The ancient commonwealths thought themselves entitled to practise, and the ancient philosophers countenanced, the regulation of every part of private conduct by public authority, on the ground that the State had a deep interest in the whole bodily and mental discipline of every

one of its citizens; a mode of thinking which may have been admissible in small republics surrounded by powerful enemies, in constant peril of being subverted by foreign attack or internal commotion, and to which even a short interval of relaxed energy and self-command might so easily be fatal, that they could not afford to wait for the salutary permanent effects of freedom. In the modern world, the greater size of political communities, and, above all, the separation between spiritual and temporal authority (which placed the direction of men's consciences in other hands than those which controlled their wordly affairs), prevented so great an interference by law in the details of private life; but the engines of moral repression have been wielded more strenuously against divergence from the reigning opinion in self-regarding, than even in social matters; religion, the most powerful of the elements which have entered into the formation of moral feeling, having almost always been governed either by the ambition of a hierarchy, seeking control over every department of human conduct, or by the spirit of Puritanism. And some of those modern reformers who have placed themselves in strongest opposition to the religions of the past, have been no way behind either churches or sects in their assertion of the right of spiritual domination....

Such being the reasons which make it imperative that human beings should be free to form opinions, and to express their opinions without reserve; and such the baneful consequences to the intellectual, and through that to the moral nature of man, unless this liberty is either conceded, or asserted in spite of prohibition; let us next examine whether the same reasons do not require that men should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow men, so long as it is at their own risk and peril. This last proviso is of course indispensable. No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression positive instigation to some mischievous act.... Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people. But if he refrains from molesting others in what concerns them, and merely acts according to his own inclination and judgement in things which concern himself, the same reasons which show that opinion should be free, prove also that he should be allowed, without molestation, to carry his opinions into practice at his own cost. That mankind are not infallible; that their truths, for the most part, are only half-truths; that unity of opinion, unless resulting from the fullest and freest comparison of opposite opinions, is not desirable, and diversity not an evil, but a good, until mankind are much more capable than at present of recognizing all sides of the truth, are principles applicable to men's modes of action, not less than to their opinions. As it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living; that free scope should be given to varieties of character, short of injury to others; and that the worth of different modes of life should be proved practically, when any one thinks fit to try them. It is desirable, in short, that in things which do not primarily concern others, individuality should assert itself. Where, not the person's own character, but the traditions or customs of other people are the rule of conduct, there is wanting one of the principal ingredients of human happiness, and quite the chief ingredient of individual and social progress.

In maintaining this principle, the greatest difficulty to be encountered does not lie in the appreciation of means towards an acknowledged end, but in the indifference of persons in general to the end itself. If it were felt that the free development of individuality is one of the leading essentials of well-being; that it is not only a co-ordinate element with all that is designated by the terms civilization, instruction, education, culture, but is itself a necessary part and condition of all those things; there would be no danger that liberty should be undervalued, and the adjustment of the boundaries between it and social control would present no extraordinary difficulty. But the evil is, that individual spontaneity is hardly recognized by the common modes of thinking, as having any intrinsic worth, or deserving any regard on its own account. The majority, being satisfied with the ways of mankind as they now are (for it is they who make them what they are) cannot comprehend why those ways should not be good enough for everybody; and what is more, spontaneity forms no part of the ideal of the majority of moral and social reformers, but is rather looked on with jealousy, as a troublesome and perhaps rebellious obstruction to the general acceptance of what these reformers, in their own judgement, think would be best for mankind.... The human faculties of perception, judgement, discriminative feeling, mental activity, and even moral preference, are exercised only in making a choice. He who does anything because it is the custom, makes no choice. He gains no practice either in discerning or in desiring what is best. The mental and moral, like the muscular powers, are

improved only by being used. The faculties are called into no exercise by doing a thing merely because others do it, no more than by believing a thing only because others believe it. If the grounds of an opinion are not conclusive to the person's own reason, his reason cannot be strengthened, but is likely to be weakened, by his adopting it: and if the inducements to an act are not such as are consentaneous to his own feelings and character (where affection, or the rights, of others, are not concerned) it is so much done towards rendering his feelings and character inert and torpid, instead of active and energetic....

It will probably be conceded that it is desirable people should exercise their understandings, and that an intelligent following of custom, or even occasionally an intelligent deviation from custom, is better than a blind and simply mechanical adhesion to it. To a certain extent it is admitted, that our understanding should be our own: but there is not the same willingness to admit that our desires and impulses should be our own likewise; or that to possess impulses of our own, and of any strength, is anything but a peril and a snare. Yet desires and impulses are as much a part of a perfect human being, as beliefs and restraints: and strong impulses are only perilous when not properly balanced; when one set of aims and inclinations is developed into strength, while others, which ought to co-exist with them, remain weak and inactive. It is not because men's desires are strong that they act ill; it is because their consciences are weak. There is no natural connexion between strong impulses and a weak conscience. The natural connexion is the other way. To say that one person's desires and feelings are stronger and more various than those of another, is merely to say that he has more of the raw material of human nature, and is therefore capable, perhaps of more evil, but certainly of more good. Strong impulses are but another name for energy. Energy may be turned to bad uses; but more good may always be made of an energetic nature, than of an indolent and impassive one. Those who have most natural feeling, are always those whose cultivated feelings may be made the strongest. The same strong susceptibilities which make the personal impulses vivid and powerful, are also the source from whence are generated the most passionate love of virtue, and the sternest self-control. It is through the cultivation of these, that society both does its duty and protects its interests: not by rejecting the stuff of which heroes are made, because it knows not how to make them. A person whose desires and impulses are his own—are the expression of his own nature, as it has been developed and modified by his own culture—is said to have a character. One whose desires and impulses are not his own, has no character, no more than a steam-engine has a character. If, in addition to being his own, his impulses are strong, and are under the government of a strong will, he has an energetic character. Whoever thinks that individuality of desires and impulses should not be encouraged to unfold itself, must maintain that society has no need of strong natures—is not the better for containing many persons who have much character—and that a high general average of energy is not desirable.

In some early states of society, these forces might be, and were, too much ahead of the power which society then possessed of disciplining and controlling them. There has been a time when the element of spontaneity and individuality was in excess, and the social principle had a hard struggle with it. The difficulty then was, to induce men of strong bodies or minds to pay obedience to any rules which required them to control their impulses. To overcome this difficulty, law and discipline, like the Popes struggling against the Emperors, asserted a power over the whole man, claiming to control all his life in order to control his character—which society had not found any other sufficient means of binding. But society has now fairly got the better of individuality; and the danger which threatens human natures is not the excess, but the deficiency, of personal impulses and preferences. Things are vastly changed, since the passions of those who were strong by station or by personal endowment were in a state of habitual rebellion against laws and ordinances, and required to be rigorously chained up to enable the persons within their reach to enjoy any particle of security. In our times, from the highest class of society down to the lowest, every one lives as under the eye of a hostile and dreaded censorship. Not only in what concerns others, but in what concerns only themselves, the individual or the family do not ask themselves—what do I prefer? or, what would suit my character and disposition? or, what would allow the best and highest in me to have fair play, and enable it to grow and thrive? They ask themselves, what is suitable to my position? what is usually done by persons of my station and pecuniary circumstances? or (worse still) what is usually done by persons of a station and circumstances superior to mine? I do not mean that they choose what is customary, in preference to what suits their own inclination. It does not occur to them to have any inclination, except for what is customary. Thus the mind itself is bowed to the yoke: even in what people do for pleasure, conformity is the first thing thought of; they like in crowds; they exercise choice only among things commonly done: peculiarity of taste, eccentricity of conduct, are shunned equally with crimes: until by dint of not following their own nature, they have no nature to follow: their human capacities are withered and starved: they

become incapable of any strong wishes or native pleasures, and are generally without either opinions or feelings of home growth, or properly their own. Now is this, or is it not, the desirable condition of human nature?

It is so, on the Calvinistic theory. According to that, the one great offence of man is self-will. All the good of which humanity is capable, is comprised in obedience. You have no choice; thus you must do, and no otherwise: "whatever is not a duty, is a sin." Human nature being radically corrupt, there is no redemption for any one until human nature is killed within him. To one holding this theory of life, crushing out any of the human faculties, capacities, and susceptibilities, is no evil: man needs no capacity, but that of surrendering himself to the will of God: and if he uses any of his faculties for any other purpose but to do that supposed will more effectually, he is better without them. This is the theory of Calvinism; and it is held, in a mitigated form, by many who do not consider themselves Calvinists; the mitigation consisting in giving a less ascetic interpretation to the alleged will of God; asserting it to be his will that mankind should gratify some of their inclinations; of course not in the manner they themselves prefer, but in the way of obedience, that is, in a way prescribed to them by authority; and, therefore, by the necessary conditions of the case, the same for all.

In some such insidious form there is at present a strong tendency to this narrow theory of life, and to the pinched and hidebound type of human character which it patronizes. Many persons, no doubt, sincerely think that human beings thus cramped and dwarfed, are as their Maker designed them to be; just as many have thought that trees are a much finer thing when clipped into pollards, or cut out into figures of animals, than as nature made them. But if it be any part of religion to believe that man was made by a good Being, it is more consistent with that faith to believe, that this Being gave all human faculties that they might be cultivated and unfolded, not rooted out and consumed, and that he takes delight in every nearer approach made by his creatures to the ideal conception embodied in them, every increase in any of the capabilities of comprehension, of action, or of enjoyment. There is a different type of human excellence from the Calvinistic; a conception of humanity as having its nature bestowed on it for other purposes than merely to be abnegated. "Pagan self-assertion" is one of the elements of human worth, as well as "Christian self-denial." There is a Greek ideal of self-development, which the Platonic and Christian ideal of self-government blends with, but does not supersede. It may be better to be a John Knox than an Alcibiades, but it is better to be a Pericles than either; nor would a Pericles, if we had one in these days, be without anything good which belonged to John Knox.

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to. In proportion to the development of his individuality, each person becomes more valuable to himself, and is therefore capable of being more valuable to others. There is a greater fullness of life about his own existence, and when there is more life in the units there is more in the mass which is composed of them. As much compression as is necessary to prevent the stronger specimens of human nature from encroaching on the rights of others, cannot be dispensed with; but for this there is ample compensation even in the point of view of human development. The means of development which the individual loses by being prevented from gratifying his inclinations to the injury of others, are chiefly obtained at the expense of the development of other people. And even to himself there is a full equivalent in the better development of the social part of his nature, rendered possible by the restraint put upon the selfish part. To be held to rigid rules of justice for the sake of others, develops the feelings and capacities which have the good of others for their object. But to be restrained in things not affecting their good, by their mere displeasure, develops nothing valuable, except such force of character as may unfold itself in resisting the restraint. If acquiesced in, it dulls and blunts the whole nature. To give any fair play to the nature of each, it is essential that different persons should be allowed to lead different lives. In proportion as this latitude has been exercised in any age, has that age been noteworthy to posterity. Even despotism does not produce its worst effects, so long as individuality exists under it; and whatever crushes individuality is despotism, by whatever name it may be called, and whether it professes to be enforcing the will of God or the injunctions of men. . . .

Reading 26: John Rawls

From *A Theory of Justice* by John Rawls. Cambridge: Harvard University Press, 1971. Reprinted by permission. © 1971 by the President and Fellows of Harvard College.

From *A Theory of Justice*

My aim is to present a conception of justice which generalizes and carries to a higher level of abstraction the familiar theory of the social contract as found, say, in Locke, Rousseau, and Kant. In order to do this we are not to think of the original contract as one to enter a particular society or to set up a particular form of government. Rather, the guiding idea is that the principles of justice for the basic structure of society are the object of the original agreement. They are the principles that free and rational persons concerned to further their own interests would accept in an initial position of equality as defining the fundamental terms of their association. These principles are to regulate all further agreements; they specify the kinds of social cooperation that can be entered into and the forms of government that can be established. This way of regarding the principles of justice I shall call justice as fairness.

Thus we are to imagine that those who engage in social cooperation choose together, in one joint act, the principles which are to assign basic rights and duties and to determine the division of social benefits. Men are to decide in advance how they are to regulate their claims against one another and what is to be the foundation charter of their society. Just as each person must decide by rational reflection what constitutes his good, that is, the system of ends which it is rational for him to pursue, so a group of persons must decide once and for all what is to count among them as just and unjust. The choice which rational men would make in this hypothetical situation of equal liberty, assuming for the present that this choice problem has a solution, determines the principles of justice.

In justice as fairness the original position of equality corresponds to the state of nature in the traditional theory of the social contract. This original position is not, of course, thought of as an actual historical state of affairs, much less as a primitive condition of culture. It is understood as a purely hypothetical situation characterized so as to lead to a certain conception of justice. Among the essential features of this situation is that no one knows his place in society, his class position or social status, nor does any one know his fortune in the distribution of natural assets and abilities, his intelligence, strength, and the like. I shall even assume that the parties do not know their conceptions of the good or their special psychological propensities. The principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favor his particular condition, the principles of justice are the result of a fair agreement or bargain. For given the circumstances of the original position, the symmetry of everyone's relations to each other, this initial situation is fair between individuals as moral persons, that is, as rational beings with their own ends and capable, I shall assume, of a sense of justice. The original position is, one might say, the appropriate initial status quo, and thus the fundamental agreements reached in it are fair. This explains the propriety of the name "justice as fairness": it conveys the idea that the principles of justice are agreed to in an initial situation that is fair. . . .

. . . Persons are at liberty to do something when they are free from certain constraints either to do it or not to do it and when their doing it or not doing it is protected from interference by other persons. If, for example, we consider liberty of conscience as defined by law, then individuals have this liberty when they are free to pursue their moral, philosophical, or religious interests without legal restrictions requiring them to engage or not to engage in any particular form of religious or other practice, and when other men have a legal duty not to interfere. A rather intricate complex of rights and duties characterizes any particular liberty. Not only must it be permissible for individuals to do or not to do something, but government and other persons must have a legal duty not to obstruct. I shall not delineate these rights and duties in any detail, but shall suppose that we understand their nature well enough for our purposes.

Several brief comments. First of all, it is important to recognize that the basic liberties must be assessed as a whole, as one system. That is, the worth of one liberty normally depends upon the specification of the other liberties, and this must be taken into account in framing a constitution and in legislation generally. While it is by and large true that a greater liberty is preferable, this holds primarily for the system of liberty as a whole, and not for each particular liberty. Clearly when the liberties are left unrestricted they collide with one another. To illustrate by an obvious example, certain rules of order are necessary for intelligent and profitable discussion. Without the

acceptance of reasonable procedures of inquiry and debate, freedom of speech loses its value. It is essential in this case to distinguish between rules of order and rules restricting the content of speech. While rules of order limit our freedom, since we cannot speak whenever we please, they are required to gain the benefits of this liberty. Thus the delegates to a constitutional convention, or the members of the legislature, must decide how the various liberties are to be specified so as to yield the best total system of equal liberty. They have to balance one liberty against another. The best arrangement of the several liberties depends upon the totality of limitations to which they are subject, upon how they hang together in the whole scheme by which they are defined.

While the equal liberties may, therefore, be restricted, these limits are subject to certain criteria expressed by the meaning of equal liberty and the serial order of the two principles of justice. Offhand there are two ways of contravening the first principle. Liberty is unequal as when one class of persons has a greater liberty than another, or liberty is less extensive than it should be. Now all the liberties of equal citizenship must be the same for each member of society. Nevertheless some of the equal liberties may be more extensive than others, assuming that their extensions can be compared. More realistically, if it is supposed that at best each liberty can be measured on its own scale, then the various liberties can be broadened or narrowed according to how they affect one another. When lexical order holds, a basic liberty covered by the first principle can be limited only for the sake of liberty itself, that is, only to insure that the same liberty or a different basic liberty is properly protected and to adjust the one system of liberties in the best way. The adjustment of the complete scheme of liberty depends solely upon the definition and extent of the particular liberties. Of course, this scheme is always to be assessed from the standpoint of the representative equal citizen. From the perspective of the constitutional convention or the legislative stage (as appropriate) we are to ask which system it would be rational for him to prefer.

A final point. The inability to take advantage of one's rights and opportunities as a result of poverty and ignorance, and a lack of means generally, is sometimes counted among the constraints definitive of liberty. I shall not, however, say this, but rather I shall think of these things as affecting the worth of liberty, the value to individuals of the rights that the first principle defines. With this understanding, and assuming that the total system of liberty is drawn up in the manner just explained, we may note that the two-part basic structure allows a reconciliation of liberty and equality. Thus liberty and the worth of liberty are distinguished as follows: liberty is represented by the complete system of the liberties of equal citizenship, while the worth of liberty to persons and groups is proportional to their capacity to advance their ends within the framework the system defines. Freedom as equal liberty is the same for all; the question of compensating for a lesser than equal liberty does not arise. But the worth of liberty is not the same for everyone. Some have greater authority and wealth, and therefore greater means to achieve their aims. The lesser worth of liberty is, however, compensated for since the capacity of the less fortunate members of society to achieve their aims would be even less were they not to accept the existing inequalities whenever the difference principle is satisfied. But compensating for the lesser worth of freedom is not to be confused with making good an unequal liberty. Taking the two principles together, the basic structure is to be arranged to maximize the worth to the least advantaged of the complete scheme of equal liberty shared by all. This defines the end of social justice.

These remarks about the concept of liberty are unhappily abstract. At this stage it would serve no purpose to classify systematically the various liberties. Instead I shall assume that we have a clear enough idea of the distinctions between them, and that in the course of taking up various cases these matters will gradually fall into place. In the next sections I discuss the first principle of justice in connection with liberty of conscience and freedom of thought, political liberty, and liberty of the person as protected by the rule of law. These applications provide an occasion to clarify the meaning of equal liberty and to present further grounds for the first principle. Moreover, each case illustrates the use of the criteria for limiting and adjusting the various freedoms and thereby exemplifies the meaning of the priority of liberty.

33. EQUAL LIBERTY OF CONSCIENCE

In the preceding chapter I remarked that one of the attractive features of the principles of justice is that they guarantee a secure protection for the equal liberties. In the next several sections I wish to examine the argument for the first principle in more detail by considering the grounds for freedom of conscience. So far, while it has been supposed that the parties represent continuing lines of claims and care for their immediate descendants, this feature has not been stressed. Nor have I emphasized that the parties must assume that they may have moral, religious, or philosophical interests which they cannot put in jeopardy unless there is no alternative. One might say that they regard themselves as having moral or religious obligations which they must keep themselves free to honor. Of course, from the standpoint of justice as fairness, these obligations are self-imposed; they are not bonds laid down by this conception of justice. The point is rather that the persons in the original position are not to view themselves as single isolated individuals. To the contrary, they assume that they have interests which they

must protect as best they can and that they have ties with certain members of the next generation who will make similar claims. Once the parties consider these matters, the case for the principles of justice is very much strengthened, as I shall now try to show.

The question of equal liberty of conscience is settled. It is one of the fixed points of our considered judgments of justice. But precisely because of this fact it illustrates the nature of the argument for the principle of equal liberty. The reasoning in this case can be generalized to apply to other freedoms, although not always with the same force. Turning then to liberty of conscience, it seems evident that the parties must choose principles that secure the integrity of their religious and moral freedom. They do not know, of course, what their religious or moral convictions are, or what is the particular content of their moral or religious obligations as they interpret them. Indeed, they do not know that they think of themselves as having such obligations. The possibility that they do suffices for the argument, although I shall make the stronger assumption. Further, the parties do not know how their religious or moral view fares in their society, whether, for example, it is in the majority or the minority. All they know is that they have obligations which they interpret in this way. The question they are to decide is which principle they should adopt to regulate the liberties of citizens in regard to their fundamental religious, moral, and philosophical interests.

Now it seems that equal liberty of conscience is the only principle that the persons in the original position can acknowledge. They cannot take chances with their liberty by permitting the dominant religious or moral doctrine to persecute or to suppress others if it wishes. Even granting (what may be questioned) that it is more probable than not that one will turn out to belong to the majority (if a majority exists), to gamble in this way would show that one did not take one's religious or moral convictions seriously, or highly value the liberty to examine one's beliefs. Nor on the other hand, could the parties consent to the principle of utility. In this case their freedom would be subject to the calculus of social interests and they would be authorizing its restriction if this would lead to a greater net balance of satisfaction. Of course, as we have seen, a utilitarian may try to argue from the general facts of social life that when properly carried out the computation of advantages never justifies such limitations, at least under reasonably favorable conditions of culture. But even if the parties were persuaded of this, they might as well guarantee their freedom straightway by adopting the principle of equal liberty. There is nothing gained by not doing so, and to the extent that the outcome of the actuarial calculation is unclear a great deal may be lost. Indeed, if we give a realistic interpretation to the general knowledge available to the parties, they are forced to reject the utilitarian principle. These considerations have all the more force in view of the complexity and vagueness of these calculations (if we can so describe them) as they are bound to be made in practice.

Moreover, the initial agreement on the principle of equal liberty is final. An individual recognizing religious and moral obligations regards them as binding absolutely in the sense that he cannot qualify his fulfillment of them for the sake of greater means for promoting his other interests. Greater economic and social benefits are not a sufficient reason for accepting less than an equal liberty. It seems possible to consent to an unequal liberty only if there is a threat of coercion which it is unwise to resist from the standpoint of liberty itself. For example, the situation may be one in which a person's religion or his moral view will be tolerated provided that he does not protest, whereas claiming an equal liberty will bring greater repression that cannot be effectively opposed. But from the perspective of the original position there is no way of ascertaining the relative strength of various doctrines and so these considerations do not arise. The veil of ignorance leads to an agreement on the principle of equal liberty; and the strength of religious and moral obligations as men interpret them seems to require that the two principles be put in serial order, at least when applied to freedom of conscience.

It may be said against the principle of equal liberty that religious sects, say, cannot acknowledge any principle at all for limiting their claims on one another. The duty to religious and divine law being absolute, no understanding among persons of different faiths is permissible from a religious point of view. Certainly men have often acted as if they held this doctrine. It is unnecessary, however, to argue against it. It suffices that if any principle can be agreed to, it must be that of equal liberty. A person may indeed think that others ought to recognize the same beliefs and first principles that he does, and that by not doing so they are grievously in error and miss the way to their salvation. But an understanding of religious obligation and of philosophical and moral first principles shows that we cannot expect others to acquiesce in an inferior liberty. Much less can we ask them to recognize us as the proper interpreter of their religious duties or moral obligations.

We should now observe that these reasons for the first principle receive further support once the parties' concern for the next generation is taken into account. Since they have a desire to obtain similar liberties for their descendants, and these liberties are also secured by the principle of equal liberty, there is no conflict of interests between generations. Moreover, the next generation could object to the choice of this principle only if the prospects offered by some other conception, say that of utility or perfection, were so attractive that the persons in the original position must not have properly considered their descendants when they rejected it. We can

express this by noting that were a father, for example, to assert that he would accept the principle of equal liberty, a son could not object that were he (the father) to do so he would be neglecting his (the son's) interests. The advantages of the other principles are not this great and appear in fact uncertain and conjectural. The father could reply that when the choice of principles affects the liberty of others, the decision must, if possible, seem reasonable and responsible to them once they come of age. Those who care for others must choose for them in the light of what they will want whatever else they want once they reach maturity. Therefore following the account of primary goods, the parties presume that their descendants will want their liberty protected.

At this point we touch upon the principle of paternalism that is to guide decisions taken on behalf of others. We must choose for others as we have reason to believe they would choose for themselves if they were at the age of reason and deciding rationally. Trustees, guardians, and benefactors are to act in this way, but since they usually know the situation and interests of their wards and beneficiaries, they can often make accurate estimates as to what is or will be wanted. The persons in the original position, however, are prevented from knowing any more about their descendants than they do about themselves, and so in this case too they must rely upon the theory of primary goods. Thus the father can say that he would be irresponsible if he were not to guarantee the rights of his descendants by adopting the principle of equal liberty. From the perspective of the original position, he must assume that this is what they will come to recognize as for their good.

I have tried to show, by taking liberty of conscience as an example, how justice as fairness provides strong arguments for equal liberty. The same kind of reasoning applies, I believe, in other cases, though it is not always so convincing. I do not deny, however, that persuasive arguments for liberty are forthcoming on other views. As understood by Mill, the principle of utility often supports freedom. Mill defines the concept of value by reference to the interests of a man as a progressive being. By this idea he means the interests men would have and the activities they would rather pursue under conditions encouraging freedom of choice. He adopts, in effect, a choice criterion of value: one activity is better than another if it is preferred by those who are capable of both and who have experienced each of them under circumstances of liberty.

Using this principle Mill adduces essentially three grounds for free institutions. For one thing, they are required to develop men's capacities and powers, to arouse strong and vigorous natures. Unless their abilities are intensely cultivated and their natures enlivened, men will not be able to engage in and to experience the valuable activities of which they are capable. Secondly, the institutions of liberty and the opportunity for experience which they allow are necessary, at least to some degree, if men's preferences among different activities are to be rational and informed. Human beings have no other way of knowing what things they can do and which of them are most rewarding. Thus if the pursuit of value, estimated in terms of the progressive interests of mankind, is to be rational that is, guided by a knowledge of human capacities and well-formed preferences, certain freedoms are indispensable. Otherwise society's attempt to follow the principle of utility proceeds blindly. The suppression of liberty is always likely to be irrational. Even if the general capacities of mankind were known (as they are not), each person has still to find himself, and for this freedom is a prerequisite. Finally, Mill believes that human beings prefer to live under institutions of liberty. Historical experience shows that men desire to be free whenever they have not resigned themselves to apathy and despair; whereas those who are free never want to abdicate their liberty. Although men may complain of the burdens of freedom and culture, they have an overriding desire to determine how they shall live and to settle their own affairs. Thus by Mill's choice criterion, free institutions have value in themselves as basic aspects of rationally preferred forms of life.

These are certainly forceful arguments and under some circumstances anyway they might justify many if not most of the equal liberties. They clearly guarantee that in favorable conditions a considerable degree of liberty is a precondition of the rational pursuit of value. But even Mill's contentions, as cogent as they are, will not it seems, justify an equal liberty for all. We still need analogues of the standard utilitarian assumptions. One must suppose a certain similarity among individuals, say their equal capacity for the activities and interests of men as progressive beings, and in addition a principle of the diminishing marginal value of basic rights when assigned to individuals. In the absence of these presumptions the advancement of human ends may be compatible with some persons being oppressed, or at least granted but a restricted liberty. Whenever a society sets out to maximize the sum of intrinsic value or the net balance of the satisfaction of interests, it is liable to find that the denial of liberty for some is justified in the name of this single end. The liberties of equal citizenship are insecure when founded upon teleological principles. The argument for them relies upon precarious calculations as well as controversial and uncertain premises.

Moreover, nothing is gained by saying that persons are of equal intrinsic value unless this is simply a way of using the standard assumptions as if they were part of the principle of utility. That is, one applies this principle as if these assumptions were true. Doing this certainly has the merit of recognizing that we have more confidence in the principle of equal liberty than in the truth of the premises from which a perfectionist or utilitarian view would derive it. The grounds for this confidence, according to the contract view, is that the

equal liberties have a different basis altogether. They are not a way of maximizing the sum of intrinsic value or of achieving the greatest net balance of satisfaction. The notion of maximizing a sum of value by adjusting the rights of individuals does not arise. Rather these rights are assigned to fulfill the principles of cooperation that citizens would acknowledge when each is fairly represented as a moral person. The conception defined by these principles is not that of maximizing anything, except in the vacuous sense of best meeting the requirements of justice, all things considered.

34. TOLERATION AND THE COMMON INTEREST

Justice as fairness provides, as we have now seen, strong arguments for an equal liberty of conscience. I shall assume that these arguments can be generalized in suitable ways to support the principle of equal liberty. Therefore the parties have good grounds for adopting this principle. It is obvious that these considerations are also important in making the case for the priority of liberty. From the perspective of the constitutional convention these arguments lead to the choice of a regime guaranteeing moral liberty and freedom of thought and belief, and of religious practice, although these may be regulated as always by the state's interest in public order and security. The state can favor no particular religion and no penalities or disabilities may be attached to any religious affiliation or lack thereof. The notion of a confessional state is rejected. Instead, particular associations may be freely organized as their members wish, and they may have their own internal life and discipline subject to the restriction that their members have a real choice of whether to continue their affiliation. The law protects the right of sanctuary in the sense that apostasy is not recognized much less penalized as a legal offense, any more than is having no religion at all. In these ways the state upholds moral and religious liberty.

Liberty of consicence is limited, everyone agrees, by the common interest in public order and security. This limitation itself is readily derivable from the contract point of view. First of all, acceptance of this limitation does not imply that public interests are in any sense superior to moral and religious interests; nor does it require that government view religious matters as things indifferent or claim the right to suppress philosophical beliefs whenever they conflict with affairs of state. The government has no authority to render associations either legitimate or illegitimate any more than it has this authority in regard to art and science. These matters are simply not within its competence as defined by a just constitution. Rather, given the principles of justice, the state must be understood as the association consisting of equal citizens. It does not concern itself with philosophical and religious doctrine but regulates individuals' pursuit of their moral and spiritual interests in accordance with principles to which they themselves would agree in an initial situation of equality. By exercising its powers in this way the government acts as the citizens' agent and satisfies the demands of their public conception of justice. Therefore the notion of the omnicompetent laicist state is also denied, since from the principles of justice it follows that government has neither the right nor the duty to do what it or a majority (or whatever) wants to do in questions of morals and religion. Its duty is limited to underwriting the conditions of equal moral and religious liberty.

Granting all this, it now seems evident that, in limiting liberty by reference to the common interest in public order and security, the government acts on a principle that would be chosen in the original position. For in this position each recognizes that the disruption of these conditons is a danger for the liberty of all. This follows once the maintenance of public order is understood as a necessary condition for everyone's achieving his ends whatever they are (provided they lie within certain limits) and for his fulfilling his interpretation of his moral and religious obligations. To restrain liberty of conscience at the boundary, however inexact, of the state's interest in public order is a limit derived from the principle of the common interest, that is, the interest of the representative equal citizen. The government's right to maintain public order and security is an enabling right, a right which the government must have if it is to carry out its duty of impartially supporting the conditions necessary for everyone's pursuit of his interests and living up to his obligations as he understands them.

Furthermore, liberty of conscience is to be limited only when there is a reasonable expectation that not doing so will damage the public order which the government should maintain. This expectation must be based on evidence and ways of reasoning acceptable to all. It must be supported by ordinary observation and modes of thought (including the methods of rational scientific inquiry where these are not controversial) which are generally recognized as correct. Now this reliance on what can be established and known by everyone is itself founded on the principles of justice. It implies no particular metaphysical doctrine or theory of knowledge. For this criterion appeals to what everyone can accept. It represents an agreement to limit liberty only by reference to a common knowledge and understanding of the world. Adopting this standard does not infringe upon anyone's equal freedom. On the other hand, a departure from generally recognized ways of reasoning would involve a privileged place for the views of some over others, and a principle which permitted this could not be agreed to in the original position. Furthermore, in holding that the consequences for the security of public order should not be merely possible or in certain cases even probable, but reasonably certain or imminent, there is again no

implication of a particular philosophical theory. Rather this requirement expresses the high place which must be accorded to liberty of conscience and freedom of thought. . . .

The characteristic feature of these arguments for liberty of conscience is that they are based solely on a conception of justice. Toleration is not derived from practical necessities or reasons of state. Moral and religious freedom follows from the principle of equal liberty; and assuming the priority of this principle, the only ground for denying the equal liberties is to avoid an even greater injustice, an even greater loss of liberty. Moreover, the argument does not rely on any special metaphysical or philosophical doctrine. It does not presuppose that all truths can be established by ways of thought recognized by common sense; nor does it hold that everything is, in some definable sense, a logical construction out of what can be observed or evidenced by rational scientific inquiry. The appeal is indeed to common sense, to generally shared ways of reasoning and plain facts accessible to all, but it is framed in such a way as to avoid these larger presumptions. Nor, on the other hand, does the case for liberty imply skepticism in philosophy or indifference to religion. Perhaps arguments for liberty of conscience can be given that have one or more of these the doctrines as premises. There is no reason to be surprised at this, since different arguments can have the same conclusion. But we need not pursue this question. The case for liberty is at least as strong as its strongest argument; the weak and fallacious ones are best forgotten. Those who would deny liberty of conscience cannot justify their action by condemning philosophical skepticism and indifference to religion, nor by appealing to social interests and affairs of state. The limitation of liberty is justified only when it is necessary for liberty itself, to prevent an invasion of freedom that would be still worse.

The parties in the constitutional convention, then, must choose a constitution that guarantees an equal liberty of conscience regulated solely by forms of argument generally accepted, and limited only when such argument establishes a reasonably certain interference with the essentials of public order. Liberty is governed by the necessary conditions for liberty itself. Now by this elementary principle alone many grounds of intolerance accepted in past ages are mistaken. Thus, for example, Aquinas justified the death penalty for heretics on the ground that it is a far graver matter to corrupt the faith, which is the life of the soul, than to counterfeit money which sustains life. So if it is just to put to death forgers and other criminals, heretics may a fortiori be similarly dealt with. But the premises on which Aquinas relies cannot be established by modes of reasoning commonly recognized. It is a matter of dogma that faith is the life of the soul and that the suppression of heresy, that is, departures from ecclesiastical authority, is necessary for the safety of souls.

Again, the reasons given for limited toleration often run afoul of this principle. Thus Rousseau thought that people would find it impossible to live in peace with those whom they regarded as damned, since to love them would be to hate God who punishes them. He believed that those who regard others as damned must either torment or convert them, and therefore sects preaching this conviction cannot be trusted to preserve civil peace. Rousseau would not, then, tolerate those religions which say that outside the church there is no salvation. But the consequences of such dogmatic belief which Rousseau conjectures are not borne out by experience. A priori psychological argument, however plausible, is not sufficient to abandon the principle of toleration, since justice holds that the disturbance to public order and to liberty itself must be securely established by common experience. There is, however, an important difference between Rousseau and Locke, who advocated a limited toleration, and Aquinas and the Protestant Reformers who did not. Locke and Rousseau limited liberty on the basis of what they supposed were clear and evident consequences for the public order. If Catholics and atheists were not to be tolerated it was because it seemed evident that such persons could not be relied upon to observe the bonds of civil society. Presumably a greater historical experience and a knowledge of the wider possibilities of political life would have convinced them that they were mistaken, or at least that their contentions were true only under special circumstances. But with Aquinas and the Protestant Reformers the grounds of intolerance are themselves a matter of faith, and this difference is more fundamental than the limits actually drawn to toleration. For when the denial of liberty is justified by an appeal to public order as evidenced by common sense, it is always possible to urge that the limits have been drawn incorrectly, that experience does not in fact justify the restriction. Where the suppression of liberty is based upon theological principles or matters of faith, no argument is possible. The one view recognizes the priority of principles which would be chosen in the original position whereas the other does not.

Questions for Discussion

1. Do you agree with Locke's social compact theory? Does it trouble you that man never lived in a state of nature?

2. Would Jefferson's Declaration have won you to the revolutionary cause? What do you make of the religious references in the document?

3. What grievances do the Presbyterians have in Virginia at the time of the Revolution? Is their motivation clearly different from that of Jefferson and Madison?

4. Do you think Jefferson and Madison are more interested in protecting government from religion or vice-versa? Why?

5. Why would religious sects, hitherto excluded from government favor, offer objection to the proposed assessment bill? Does Madison's remonstrance strike you as a forceful and convincing argument against multiple establishment of religion?

6. Does Garnet's use of the country's religious and political heritage present a convincing argument against slavery? Why or why not?

7. Do you find convincing John Stuart Mill's argument that religious liberty should be supported because it serves the interests of society? Why or why not?

8. Has John Rawls convinced you that, were you in the original position he posits, you would choose religious liberty? Do his ideas of individuals contracting with each other to shape their society differ from Locke's? Are you willing to agree more with one writer than the other? Why?

Chapter Four

The Constitutional Foundation: What Did the Religion Clauses Mean?

Under the first federal constitution for the United States, the Articles of Confederation, which were framed and ratified during the Revolutionary War, all effective power was left in the new states of the union, including any authority over religious matters. With the states left free to pursue their own interests without any external regulation, the union was threatened. Even before the Articles of Confederation were ratified in 1781, some political leaders were working to displace them with a more effective constitution. This movement resulted in the Philadelphia Convention of 1787, which was charged with amending the Articles. The assembled delegates quickly concluded that an entirely new constitution was needed to provide a more effective union. What emerged from Philadelphia was the Constitution of 1787 that was sent to state conventions for ratification.

Although proposals had circulated in the Philadelphia Convention regarding religious matters, the document that emerged spoke only to the questions of oaths and religious tests for office. Neither achievement should be slighted, but those who passed judgment on the work of the framers wanted more in the way of a protection for the rights of the people, including some guarantee of religious liberty. The protest did not halt the ratification of the Constitution, but it did lead to the addition of the Bill of Rights in 1791. In the Bill's First Amendment was placed a protection of free exercise of religion and a bar to its establishment. As with the entire Bill of Rights, the First Amendment bound only the newly established federal government.

The words of the original Constitution providing for an affirmation instead of an oath and forbidding any religious test for public office begin the readings here (Reading 27). There was some opposition to the course the framers had taken, and Oliver Ellsworth, a delegate from Connecticut who would later become Chief Justice of the United States Supreme Court, responded in defense of the provisions (Reading 28). The main selection is taken from Anson Phelps Stokes, *Church and State in the United States*, 3 vols., and it includes virtually all of the original House debate on the religion clauses of the First Amendment (Reading 29). Ending this chapter are the words of the First Amendment (Reading 30).

At the heart of much of the controversy over the relationship of religion and government in the United States lies the question of just what the First Amendment's religion clauses meant when they were added to the Constitution. This question can be posed in two different ways: What was the intent of the men in Congress who formulated the clauses? Or, What was the general understanding of their meaning in the society they were designed to serve? At times in the ongoing controversy over the proper reading of the religion clauses, the two questions are confused. Both questions resist easy answers, but the first, concerning original intent, is much narrower than the second, for the sources necessary to make an informed response are more discrete.

It is to the question of the original intent that the readings here are directed. As you attempt to find a satisfying answer to that question, you can rest assured that you have in the following readings the basic material available on the subject.

Reading 27: Article VI, U.S. Constitution, 1787

The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution, but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States.

Reading 28: Oliver Ellsworth

On Religious Tests from "Letters to a Landholder," December 17, 1787.

Some very worthy persons who have not had great advantages for information have objected against that clause in the Constitution which provides that no religious test shall ever be required as a qualification to any office or public trust under the United States. They have been afraid that this clause is unfavorable to religion. But, my countrymen, the sole purpose and effect of it is to exclude persecution and to secure to you the important right of religious liberty. We are almost the only people in the world who have a full enjoyment of this important right of human nature. In our country every man has a right to worship God in that way which is most agreeable to his conscience. If he be a good and peaceable person, he is liable to no penalties or incapacities on account of his religious sentiments; or, in other words, he is not subject to persecution.

But in other parts of the world it has been, and still is, far different. Systems of religious error have been adopted in times of ignorance. It has been the interest of tyrannical kings, popes, and prelates to maintain these errors. When the clouds of ignorance began to vanish and the people grew more enlightened, there was no other way to keep them in error but to prohibit their altering their religious opinions by severe persecuting laws. In this way persecution became general throughout Europe. It was the universal opinion that one religion must be established by law; and that all who differed in their religious opinions must suffer the vengeance of persecution. In pursuance of this opinion, when popery was abolished in England and the Church of England was established in its stead, severe penalties were inflicted upon all who dissented from the established church. In the time of the civil wars, in the reign of Charles I, the Presbyterians got the upper hand and inflicted legal penalties upon all who differed from them in their sentiments respecting religious doctrines and discipline. When Charles II was restored, the Church of England was likewise restored, and the Presbyterians and other dissenters were laid under legal penalties and incapacities.

It was in this reign that a religious test was established as a qualification for office; that is, a law was made requiring all officers, civil and military (among other things), to receive the sacrament of the Lord's Supper, according to the usage of the Church of England, within six months after their admission to office, under the penalty of £500 and disability to hold the office. And by another statute of the same reign, no person was capable of being elected to any office relating to the government of any city or corporation unless, within a twelvemonth before, he had received the sacrament according to the rites of the Church of England. The pretense for making these severe laws, by which all but churchmen were made incapable of any office, civil or military, was to exclude the Protestant dissenters. From this account of test laws, there arises an unfavorable presumption against them. But if we consider the nature of them and the effects which they are calculated to produce, we shall find that they are useless, tyrannical, and peculiarly unfit for the people of this country.

A religious test is an act to be done or profession to be made relating to religion (such as partaking of the sacrament according to certain rites and forms, or declaring one's belief of certain doctrines) for the purpose of determining whether his religious opinions are such that he is admissible to a public office. A test in favor of any one denomination of Christians would be to the last degree absurd in the United States. If it were in favor of either Congregationalists, Presbyterians, Episcopalians, Baptists, or Quakers, it would incapacitate more than three-fourths of the American citizens for any public office and thus degrade them from the rank of freemen. There need be no argument to prove that the majority of our citizens would never submit to this indignity.

If any test act were to be made, perhaps the least exceptionable would be one requiring all persons appointed to office to declare, at the time of their admission, their belief in the being of a God, and in the divine authority of the Scriptures. In favor of such a test, it may be said that one who believes these great truths will not be so likely to violate his obligations to his country as one who disbelieves them; we may have greater confidence in his integrity. But I answer: His making a declaration of such a belief is no security at all. For suppose him to be an unprincipled man who believes neither the Word nor the being of God, and to be governed merely by selfish motives; how easy is it for him to dissemble! How easy is it for him to make a public declaration of his belief in the creed which the law prescribes and excuse himself by calling it a mere formality.

This is the case with the test laws and creeds in England. The most abandoned characters partake of the sacrament in order to qualify themselves for public employments. The clergy are obliged by law to administer the ordinance unto them, and thus prostitute the most sacred office of religion, for it is a civil right in the party to receive the sacrament. In that country, subscribing to the Thirty-Nine Articles is a test for administration into Holy Orders. And it is a fact that many of the clergy do this, when at the same time they totally disbelieve several of the doctrines contained in them. In short, test laws are utterly ineffectual; they are no security at all, because men of loose principles will, by an external compliance, evade them. If they exclude any persons, it will be honest men, men of principle who will rather suffer an injury than act contrary to the dictates of their consciences. If we

mean to have those appointed to public offices who are sincere friends to religion, we, the people who appoint them, must take care to choose such characters, and not rely upon such cobweb barriers as test laws are.

But to come to the true principle by which this question ought to be determined: The business of a civil government is to protect the citizen in his rights, to defend the community from hostile powers, and to promote the general welfare. Civil government has no business to meddle with the private opinions of the people. If I demean myself as a good citizen, I am accountable not to man but to God for the religious opinions which I embrace and the manner in which I worship the Supreme Being. If such had been the universal sentiments of mankind and they had acted accordingly, persecution, the bane of truth and nurse of error, with her bloody axe and flaming brand, would never have turned so great a part of the world into a field of blood.

But while I assert the rights of religious liberty, I would not deny that the civil power has a right, in some cases, to interfere in matters of religion. It has a right to prohibit and punish gross immoralities and impieties; because the open practice of these is of evil example and detriment. For this reason, I heartily approve of our laws against drunkenness, profane swearing, blasphemy, and professed atheism. But in this state, we have never thought it expedient to adopt a test law; and yet I sincerely believe we have as great a proportion of religion and morality as they have in England, where every person who holds public office must either be a saint by law or a hypocrite by practice. A test law is the parent of hypocrisy, and the offspring of error and the spirit of persecution. Legislatures have no right to set up an inquisition and examine into the private opinions of men. Test laws are useless and ineffectual, unjust and tyrannical; therefore the Convention have done wisely in excluding this engine of persecution, and providing that no religious test shall ever be required.

Reading 29: Anson Phelps Stokes

From *Church and State in the United States*, Vol. I, by Anson Phelps Stokes. New York: Harper and Row Publishing, Inc., 1950. Reproduced by permission of the publisher.

From *Church and State in the United States*

Section 2. The Bill of Rights (1789-91)

There had been considerable demand in the Constitutional Convention of 1787 for a bill of rights, including the guarantee of complete religious freedom, but the assembly knew that some states were too wedded to their Congregational or Episcopal establishments to face the issue squarely. So nothing came of the proposal, made near the close of the session, that a bill of rights be adopted. Here is the record from the minutes of the Convention, September 12, 1787: "It was moved and seconded to appoint a Committee to prepare a Bill of Rights which passed in the negative" (by a vote of 0 to 10).

Madison's *Journal* contains these additional details:

> Col: Mason . . . wished the plan had been prefaced with a Bill of Rights, & would second a Motion if made for the purpose – It would give great quiet to the people; and with the aid of the State declarations, a bill might be prepared in a few hours.
>
> Mr. Gerry concurred in the idea & moved for a Committee to prepare a Bill of Rights. Col: Mason 2ded the motion.
>
> Mr. Sherman. was for securing the rights of the people where requisite. The State Declarations of Rights are not repealed by this Constitution; and being in force are sufficient – There were many cases where juries are proper which cannot be discriminated. The Legislature may be safely trusted.
>
> Col: Mason. The Laws of the U.S. are to be paramount to State Bills of Rights. On the question for a Come to prepare a Bill of Rights.
>
> N.H. no. Mas. abst. Ct. no. N – J – no. Pa. no. Del – no. Md . no. Va no. N – C. no. S – C. – no – Geo – no. [Ayes – 0; noes – 10; absent – 1.]

Evidently among the factors which controlled the convention in taking no action on the proposed bill of rights were two of special importance: the feeling of most of the delegates that this matter could wisely be left to the states, several of which had already taken forward-looking action, and the realization that they could not adopt such a bill without including

religious freedom, and this might shipwreck the ratification of the Constitution in certain states with establishments to which a majority of their leading citizens were devoted. So it seemed best to make haste slowly.

(I) THE ADOPTION OF THE CHURCH-STATE SEPARATION AND OTHER GUARANTEES

Bills of rights already existed in eight of the new states, and at least four of them were used by Madison as the basis for drafting the Bill presently adopted by Congress. Furthermore, half of the recently formed states had provided, either in their bills of rights or in their constitutions, guarantees of religious freedom—that is, freedom of faith and worship, and the equality of religious bodies before the law—which the Supreme Court has always upheld.

On May 4, 1789, four days after the inauguration of President Washington, Madison announced to the House of Representatives, then assembled in Federal Hall, New York, that "he intended to bring on the subject of Amendments to the Constitution, on the fourth Monday of this Month." It was well known that he had a bill of rights in mind, something that would protect the nation against the possible arbitrary acts of government. This is a matter which Jefferson also had always had much at heart.

On June 8 Madison urged the adoption of the Bill of Rights. He stated that it was no secret that many Americans, "respectable for their talents and respectable for the jealousy which they have for liberty," were dissatisfied with the Constitution as it stood because it "did not contain effectual provisions against encroachments on particular rights, and those safeguards which they have been long accustomed to have interposed between them and the magistrate who exercises the sovereign power." "We ought not to disregard their inclination," he urged, "but, on principles of amity and moderation, conform to their wishes and expressly declare the great rights of mankind secured under this Constitution."

The House, after a full discussion recorded later in this section, agreed upon the proposed amendments and sent them to the Senate on August 24. Discussion of differences between the two Houses followed; and on September 25, 1789, the Senate concurred "in the amendments proposed by the House of Representatives to the amendments of the Senate."

The joint resolution embodying the Bill of Rights bore a preamble which stated that it was issued because "the conventions of a number of states" had "at the time of their adopting the Constitution, expressed a desire, in order to prevent misconstruction or abuse of its powers, that further declaratory and restrictive clauses should be added," and because "extending the grounds of public confidence in the government will best secure the beneficent ends" of its institution.

The first of the amendments to the Constitution thus adopted by Congress in 1789 and ratified by the requisite number of states in 1791, is of prime importance in connection with the relations of Church and State in the United States. It reads as follows:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble and to petition the Government for a redress of grievances.

These rights are interrelated. They are all of importance from the standpoint of the Churches. Freedom of speech is related to preaching; freedom of the press to religious journalism; freedom of assembly and petition to church meetings; but here we are mainly concerned with religious freedom and Church-State separation.

The original Constitution had gone far by guaranteeing to all citizens personal religious freedom in the matter of Federal officeholding, and in thereby implying Federal Church-State separation. The First Amendment went further in prohibiting Congress from establishing a Church or preventing freedom of worship. It was important both from the standpoint of assuring that there be no tie-up between the government and any religious body, and in further guaranteeing religious rights, but the former is perhaps the more important provision. It is mentioned first, and is to a large extent the basis on which religious freedom can be assured. This is doubly true now that under the Supreme Court's interpretation of the Fourteenth Amendment the guarantees of the First are also made applicable to the states.

These points need emphasis. It is to be noted that the first portion of this amendment dealing with religion is divided into two separate but closely interrelated parts. The first prevents the "establishment" by law of any Church, and goes somewhat further by the use of the word "respecting," which prohibits any law relating to the Church specifically designed to control its activities. The recent Supreme Court decisions in the new Jersey bus and Champaign released-time cases show that the clause must be broadly interpreted in the interest of maintaining the separation of the two institutions.

The second portion of the religious clause guarantees religious freedom: every person or group can worship God as he, she, or it pleases, without any State interference so long as the usual requirements of law and order are observed.

An evidence that the guarantees of the First Amendment commended themselves to the American people after long experience in living under them is shown by the fact that they were also incorporated, March 11, 1861, as part of the constitution then adopted for the Confederate States of America.

To understand the origin of these and the other provisions, the experience of Virginia (1776) and Massachusetts (1780) in adopting their bills of rights should be studied, as well as the debates in the various state conventions called to consider ratifying the Constitution.

A reading of these and other public utterances and papers of the time shows that many Federalists thought these protections of liberty superfluous. They were concerned with protecting the government against mass public opinion at any given moment rather than in protecting the people against themselves or their own government. The Bill of Rights assured, as far as a duly adopted charter could, the preservation of true liberty—the rights of the citizen which could not be taken away either by an excited populace or by reactionary forces in the State.

When the First Amendment was drawn the fight against established churches had already been won in four states, and several new state constitutions forbade the arrangement. Disestablishment was progressing by state action, although a few states wished to preserve the status quo. The main purpose of the Amendment, as Judge Story (1779-1845), one of the most eminent of constitutional historians, asserted, was not to injure Christianity

> but to exclude all rivalry among Christian sects and to prevent any national ecclesiastical establishment which should give to any hierarchy the exclusive patronage of the national government.

It has been said that history shows that "Whosoever has power alone has civil liberty." There has been some justification for the claim in our own history, but the Bill of Rights was a brave attempt to prevent this condition. This is why Jefferson so heartily favored such a bill. Its omission from the Constitution itself had greatly pained him. He wrote from Paris to Madison under date of December 20, 1787:

> I will now add what I do not like; first, the omission of a bill of rights, providing clearly and without the aid of sophisms, for freedom of religion, freedom of the press, etc.... Let me add that a bill of rights is what the people are entitled to against every government on earth, general or particular, and what no government should refuse or rest on inference....

A careful study of the preliminaries in Congress leading up to the adoption of the epoch-making clause in behalf of religious freedom seems necessary. This is difficult to make with entire confidence in details because the records are meager and inadequately prepared and edited. It shows, however, that on June 8, 1789, Madison offered a series of proposed Constitutional amendments for the approval of the House of Representatives. These included this statement to be added in Article I, Sections 9 and 10, of the original Constitution:

> The civil rights of none shall be abridged on account of religious belief or worship, nor shall any national religion be established, nor shall the full and equal rights of conscience be in any manner, or on any pretext, infringed.
>
> No State shall violate the equal rights of conscience, or the freedom of the press, or the trial by jury in criminal cases.

The word "national" was added to meet the scruples of states with an Established Church. It will be noticed that the last clause proposed to extend the religious guarantee to the states, thus going further than the later Federal Bill of Rights.

Madison's proposals were referred to the committee of the whole, but on July 21 this committee was discharged from further consideration of this matter and the House appointed a representative "committee of eleven" with a member from each state to consider both Madison's amendments and those suggested by the various states—Madison being on the committee. The special committee, under the chairmanship of John Vining (1758-1862) of Delaware, reported on July 28; the report was laid on the table. It was taken up August 15, when the House resolved itself again into a committee of the whole. There was much discussion over the proposed religious freedom and Church-State separation amendment. The debate in the House is so important for the understanding of the historical foundations of our religious freedom that the record is here given in full from the *Annals of Congress* for August 15, 1789.

AMENDMENTS TO THE CONSTITUTION

> The House again went into a Committee of the whole on the proposed amendments to the constitution, Mr. BOUDINOT in the chair.
>
> The fourth proposition being under consideration, as follows:
>
> Article I, Section 9. Between paragraphs two and three insert "no religion shall be established by law, nor shall the equal rights of conscience be infringed."
>
> Mr. SYLVESTER had some doubts of the propriety of the mode of expression used in this para-

graph. He apprehended that it was liable to a construction different from what had been made by the committee. He feared it might be thought to have a tendency to abolish religion altogether.

Mr. VINING suggested the propriety of transposing the two members of the sentence.

Mr. GERRY said it would read better if it was, that no religious doctrine shall be established by law.

Mr. SHERMAN thought the amendment altogether unnecessary, inasmuch as Congress had no authority whatever delegated to them by the constitution to make religious establishments; he would, therefore, move to have it struck out.

Mr. [Daniel] CARROLL.–As the rights of conscience are, in their nature, of peculiar delicacy, and will little bear the gentlest touch of governmental hand; and as many sects have concurred in opinion that they are not well secured under the present constitution, he said he was much in favor of adopting the words. He thought it would tend more towards conciliating the minds of the people to the Government than almost any other amendment he had heard proposed. He would not contend with gentlemen about the phraseology, his object was to secure the substance in such a manner as to satisfy the wishes of the honest part of the community.

Mr. MADISON said, he apprehended the meaning of the words to be, that Congress should not establish a religion, and enforce the legal observation of it by law, nor compel men to worship God in any manner contrary to their conscience. Whether the words are necessary or not, he did not mean to say, but they had been required by some of the State Conventions, who seemed to entertain an opinion that under the clause of the constitution, which gave power to Congress to make all laws necessary and proper to carry into execution the constitution, and the laws made under it, enabled them to make laws of such a nature as might infringe the rights of conscience, and establish a national religion; to prevent these effects he presumed the amendment was intended, and he thought it as well expressed as the nature of language would admit.

Mr. HUNTINGTON said that he feared, with the gentleman first up on this subject, that the words might be taken in such latitude as to be extremely hurtful to the cause of religion. He understood the amendment to mean what had been expressed by the gentleman from Virginia; but others might find it convenient to put another construction upon it. The ministers of their congregations to the Eastward were maintained by the contributions of those who belonged to their society; the expense of building meetinghouses was contributed in the same manner. These things were regulated by by-laws. If an action was brought before a Federal Court on any of these cases, the person who had neglected to perform his engagements could not be compelled to do it; for a support of ministers, or building of places of worship might be construed into a religious establishment.

By the charter of Rhode Island, no religion could be established by law; he could give a history of the effects of such a regulation; indeed the people were now enjoying the blessed fruits of it. He hoped, therefore, the amendment would be made in such a way as to secure the rights of conscience, and a free exercise of the rights of religion, but not to patronize those who professed no religion at all.

Mr. MADISON thought, if the word national was inserted before religion, it would satisfy the minds of honorable gentlemen. He believed that the people feared one sect might obtain a pre-eminence, or two combine together, and establish a religion to which they would compel others to conform. He thought if the word national was introduced, it would point the amendment directly to the object it was intended to prevent.

Mr. LIVERMORE was not satisfied with that amendment; but he did not wish them to dwell long on the subject. He thought it would be better if it was altered, and made to read in this manner, that Congress shall make no laws touching religion, or infringing on the rights of conscience.

Mr. GERRY did not like the term national, proposed by the gentleman from Virginia, and he hoped it would not be adopted by the House. It brought to his mind some observations that had taken place in the conventions at the time they were considering the present constitution. It had been insisted upon by those who were called antifederalists, that this form of Government consolidated the Union; the honorable gentleman's motion shows that he considers it in the same light. Those who were called antifederalists at that time complained that they had injustice done them by the title, because they were in favor of a Federal Government, and the others were in favor of a national one; the federalists were for ratifying the constitution as it stood, and the others not until amendments were made. Their names then ought

not to have been distinguished by federalists and antifederalists, but rats and antirats [evidently ratificationists and antiratificationists].

Mr. MADISON withdrew his motion, but observed that the words "no national religion shall be established by law," did not imply that the Government was a national one; the question was then taken on Livermore's motion, and passed in the affirmative, thirty-one for, and twenty against it.

The Mr. Livermore referred to in the *Journal* of Congress is Samuel Livermore (1732-1803), a man who has received almost no public credit for his services in suggesting the essential part of the phraseology of our religious freedom guarantee, though this was somewhat modified in later conference. Even the otherwise excellent sketch of him in the *Dictionary of American Biography* does not refer at all to this contribution, and no reference to it is made in the standard American histories....

Throughout this momentous debate there were references to the "anxiety" felt by large sections of the people over the omission of a bill of rights from the Constitution. This was well expressed by Madison in the debate in the House, August 15:

> I appeal to the gentlemen who have heard the voice of the country, to those who have attended the debates of the State conventions, whether the amendments now proposed are not those most strenuously required by the opponents to the constitution? ... Have not the people been told that the rights of conscience, the freedom of speech, the liberty of the press, and trial by jury were in jeopardy? that they ought not to adopt the constitution until those important rights were secured to them?

The committee of eleven had also recommended adding a clause to the Constitution to the effect that "no person religiously scrupulous shall be compelled to bear arms," a clause based on the proposals of Virginia and Carolina. This proposal was strongly supported and favored on August 17, and the reasons for its final omission are not clear.

In the same report the Committee of Eleven included a recommendation long urged by Madison. The *Journal* thus refers to this matter:

> The committee then proceeded to the fifth proposition:
>
> Article I, section 10, between the first and second paragraph, insert "no State shall infringe the equal rights of conscience, nor the freedom of speech or of the press, nor of the right of trial by jury in criminal cases."
>
> Mr. TUCKER.–This is offered, I presume, as an amendment to the constitution of the United States, but it goes only to the alteration of the constitution of particular States. It will be much better, I apprehend, to leave the State Governments to themselves, and not to interfere with them more than we already do; and that is thought by many to be rather too much. I therefore move, sir, to strike out these words.
>
> Mr. Madison conceived this to be the most valuable amendment in the whole list. If there was any reason to restrain the Government of the United States from infringing upon these essential rights, it was equally necessary that they should be secured against the State Governments. He thought that if they provided against the one, it was as necessary to provide against the other, and was satisfied that it would be equally grateful to the people.
>
> Mr. LIVERMORE had no great objection to the sentiment, but he thought it not well expressed. He wished to make it an affirmative proposition; "the equal rights of conscience, the freedom of speech or of the press, and the right of trial by jury in criminal cases, shall not be infringed by any State."
>
> This transposition being agreed to, and Mr. TUCKER's motion being rejected, the clause was adopted.

Unfortunately the clause thus approved by the House was among those "disagreed to" by the Senate on September 21, undoubtedly due mainly to state rights feelings. It is interesting to note Livermore again supporting Madison on a broad-gauge proposal regarding religious freedom.

In the debate on August 18 and 23, Mr. Tucker (Thomas Tucker, 1745-1828) of South Carolina proposed the addition of the word "other" between the words "No" and "religious Test" in Article VI; but this was finally "passed in the negative"–that is, voted down; a wise decision, for otherwise the oath or affirmation for officeholders provided for would have been designated specifically as a religious test, which it was not intended to be, but rather as an assurance of action taken with great solemnity as in the presence of God.

On August 19 Roger Sherman of Connecticut again pressed his idea that the amendments should not be inserted in the original Constitution but placed in separate articles in a supplement, and won his point, supported by Livermore and

ers. The next day, August 20, the "supplement" idea for all the amendments was adopted.

On motion of Mr. Ames (Fisher Ames [1758-1805] of Massachusetts) the amendment regarding religious freedom was altered so as to read, "Congress shall make no law establishing religion, or to prevent the free exercise thereof, or to infringe the rights of conscience."

The exact arrangement of the amendments was referred August 22 to a subcommittee consisting of Egbert Benson as chairman, with Roger Sherman and Theodore Sedgwick, "who were directed to arrange the said amendments and make report thereof." Evidently the committee's duties were similar to those of the committee "on style" of the original Constitution. Indeed the records refer to it in one place as the committee on "style and arrangement."

The next and final action of the House was taken two days later on August 24th when the *Journal* states that

> Mr. Benson, from the committee appointed for the purpose, reported an arrangement of the articles of amendment to the constitution of the United States, as agreed to by the House on Friday last; also, a resolution prefixed to the same, which resolution was twice read and agreed to by the House as follows:
>
> *Resolved by the Senate and House of Representatives of the United States of America in Congress assembled*, (two-thirds of both Houses deeming it necessary,) That the following articles be proposed to the Legislatures of the several States as amendments to the constitution of the United States, all or any of which articles, when ratified by three-fourths of the said Legislatures, to be valid to all intents and purposes as part of the said constitution.

The Mr. Benson referred to was Egbert Benson (1746-1833), a distinguished New York jurist for four years a member of the Continental Congress, who had taken the lead in the New York legislature in advocating the acceptance of the Federal Constitution.

After agreeing to this resolution the House

> *Ordered*. That the Clerk of this House do carry to the Senate a fair engrossed copy of the said proposed articles of amendment, and desire their concurrence.

On the following day (August 25) the Senate received a communication from the House requesting its concurrence with the amendment adopted. A lively debate soon began. We fortunately have this record of the discussion on September 3:

> On motion to amend article third, and to strike out these words: 'religion, or prohibiting the free exercise thereof,' and insert 'one religious sect or society in preference to others:'
>
> It passed in the negative.
>
> On motion for reconsideration:
>
> It passed in the affirmative.
>
> On motion that article the third be stricken out:
>
> It passed in the negative.
>
> On motion to adopt the following, in lieu of the third article: 'Congress shall not make any law infringing the rights of conscience, or establishing any religious sect or society:'
>
> It passed in the negative.
>
> On motion to amend the third article, to read thus: 'Congress shall make no law establishing any particular denomination of religion in preference to another, or prohibiting the free exercise thereof, nor shall the rights of conscience be infringed:'
>
> It passed in the negative.

This action was significant in showing that Congress was not satisfied with a proposal which merely prevented an advantage to any one denomination over others as far as Church-State separation was concerned. It wished to go further.

On September 9 the Senate "proceeded in the consideration of the resolve of the House of Representatives of the 24th of August, on Articles to be proposed to the legislatures of the several states as amendments to the constitution of the United States"; and more closely defined the establishment of religion clause, and combined this article (old III) with the following one, Article IV, producing the preliminary Senate form of the First Amendment:

> On motion to amend article the third, to read as follows: 'Congress shall make no law establishing articles of faith or a mode of worship, or prohibiting the free exercise of religion, or abridging the freedom of speech, or the press, or the right of the people peaceably to assemble, and petition to the government for the redress of grievances:'
>
> It passed in the affirmative.

The abstract of the Senate records for September 21 show disagreement on some of the House propositions, and agreement on others; Article III, involving religious freedom, being one over the exact wording of which they disagreed. It was therefore decided that the Senate "do concur with the" proposal of the House "that a conference be desired with the

Senate on the subject matter of the amendments disagreed to." Oliver Ellsworth (1745-1807) of Connecticut, Charles Carroll (1737-1832) of Maryland, and William Paterson (1745-1806) of New Jersey were appointed to represent the Senate in straightening out the points at issue; with James Madison (1751-1836) of Virginia, Roger Sherman (1721-93) of Connecticut, and John Vining (1758-1802) of Delaware chosen by the House—a strong joint committee, four of whom had been members of the Constitutional Convention. The inclusion of Carroll, a Roman Catholic, is significant.

The choice of the heads of the two delegations is significant. Madison had proved himself a most earnest and intelligent advocate of Church-State separation and religious freedom, as we have repeatedly pointed out; and Ellsworth had written forcefully on the absurdity of giving any church a favored position or of curtailing religious liberty. Wiser choices could not have been made. Unfortunately, the minutes of the committee's deliberations have not been preserved, if any were ever kept; but we can be reasonably sure, from experience in other situations, that Madison played the leading part in adjusting the Livermore formula so as to make it even more effective and more completely acceptable to the Senate.

The Senate *Journal* for Thursday, September 24, contains two important entries dealing with the subject. The first is a report from Senator Ellsworth representing the managers of the conference committee to the effect

> that it will be proper for the House of Representatives to agree to the said amendments, proposed by the Senate, with an amendment to their fifth amendment, so that the third article shall read as follows: 'Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.' . . .

The second is a direct message from the House received later the same day quoting the above action giving the vote on religious freedom which the conferees had accepted and which the House of Representatives had approved, but making their approval of the other Senate amendments dependent upon the acceptance of this new phraseology and a change in Article 8. The exact minute reads as follows:

> A message from the House of Representatives:
>
> Mr. Beckley, their Clerk, brought up the amendments to the "Articles to be proposed to the legislatures of the several states, as amendments to the constitution of the United States;" and informed the Senate, that the House of Representatives had *receded* from their disagreement to the 1st, 3d, 5th, 6th, 7th, 9th, 10th, 11th, 14th, 15th, 17th, 20th, 21st, 22d, 23d, and 24th amendments, insisted on by the Senate: provided that the "two articles, which, by the amendments of the Senate, are now proposed to be inserted as the third and eighth articles," shall be amended to read as followeth:
>
> Art. 3. Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and petition the government for a redress of grievances.
>
> The following day, September 25, it was
>
> Resolved, That the Senate do concur in the amendments proposed by the House of Representatives to the amendments of the Senate.

These compromises, as adopted by the House on September 24 and by the Senate on September 25, restored the religious clauses nearer to the original Livermore formula. They resulted in the present wording of Article 1 of the Bill of Rights.

The Congress adjourned September 29 after completing with honor its vitally important work.

Reading 30: First Amendment, U.S. Constitution, 1791.

Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people to peaceably assemble, and to petition the Government for a redress of grievances.

Questions for Discussion

1. Do you have any sympathy with the religious groups who were disturbed by the Constitution barring religious tests?

2. Does Oliver Ellsworth adequately respond to these concerns? Is his defense convincing?

3. Once work on a bill of rights was begun, it was certain to contain provisions dealing with religious liberty. Would you have preferred one of the discarded alternatives to the religion clauses actually inserted into the First Amendment? Which one? Why?

4. Do you agree that the religion clauses, as approved, had a broader reach than other versions that had been proposed?

5. Since Madison played a key role in gaining agreement on the final version of the clauses, do you feel that their meaning should be fixed by Madison's earlier words as to what he was trying to accomplish?

6. Even if you believe that original intent should govern the interpretation of the Constitution, can you find that intent in this material? If so, how is it useful in resolving any of the current controversies involving religion and government?

Part II

The Legal Experience

To understand religion and government in the United States, we need to recognize how the Supreme Court has shaped the way we view the subject. There are two reasons for this fact: first, the Court is the definitive interpreter of the Constitution; and second, in our society we have accepted legal standards as reliable guides for social choice. And no matter what may be our evaluation of the Court's reading of our history, we cannot escape the fact that what the Justices decide becomes part of that history.

Considerable controversy exists over the question of how the Justices of the Supreme Court should determine what constitutional language means. Although critics have argued, with some justification, that a constitution created in the eighteenth century could not survive unless its interpretation was flexible enough to contend with changing circumstances, the Supreme Court has continually sought to bolster its interpretations by enlisting history on its side. Nowhere has this practice been more consistent than in the Justices' reading of the religion clauses. So, criticism here has not arisen because the Court has rejected history as a guide, but rather because it has been charged with reading history in a selective and one-sided way. You will get a chance to evaluate this indictment, for dissenting Justices in their opinions have been as harsh as some outside critics in castigating the work of the Court.

Before the latter nineteenth century, the Supreme Court paid little attention to the Bill of Rights.It did rule that the religion clauses restricted only the federal government and not the states and did say that law supports no religious dogma or sect, but that was all. Only in 1879 in the first of a series of Mormon cases did the Court begin the process of fixing the language of the religion clauses through a review of eighteenth century history. What is significant in this first attempt was that it set the context for all further explorations by the Court. To the Mormon claim that a federal ban on polygamy was an interference with the free exercise of religion as guaranteed by the First Amendment, the Court responded in the negative. Criminal conduct, the Justices said, could not be sheltered by a claim of religious liberty.

Although this first significant case concerned federal law, which was clearly circumscribed by the First Amendment, most of the litigation that followed concerned not federal but state and local action. But how could this be, given the agreed upon understanding that the First Amendment, at the time of its enactment, did not apply to state and local activity?

The story of how the First Amendment's guarantees became binding on all units of government is fairly complex, but its broad outlines can be traced. We begin after the Civil War when Congress sought to provide some constitutional protection for newly emancipated black persons. The Thirteenth Amendment had abolished slavery, but continued Southern resistance to the extension of civil rights to blacks led to further constitutional change. The Fourteenth Amendment included within its provisions a requirement that states not deny to any person life, liberty or property without due process of law.A few of the congressmen closely associated with the above phraseology expressed their intent to bind the states by the federal Bill of Rights. If that was their intent, it was not immediately successful, for neither the Supreme Court nor Congress so read the language in the Fourteenth Amendment. In fact, a proposed amendment was introduced in Congress in the 1870s specifically to make the religion clauses of the First Amendment binding on state and local government. Obviously, neither the framers of this proposed amendment nor those who discussed it thought that the job had already been done by the Fourteenth Amendment.

Throughout the latter nineteenth century and into the twentieth, one Justice stood alone in concluding that the Fourteenth Amendment had made the Bill of Rights applicable to the states. Despite his lack of success, the Court had read into the Fourteenth Amendment a due process requirement that gave it the opportunity to invalidate certain state social and economic legislation. With the Court ready to protect property from hostile state action, would it in time read new protection for individual rights into the life and liberty provisions as well?

The answer was yes, and the process was stimulated by the Court's first substantial confrontation with the meaning of the First Amendment in the aftermath of the First World War. Although the Court upheld the wartime suppression of free speech, it began a dialogue with the claim of individual rights that had substantial implications.

In the 1920s a politically conservative Court began to view claims of a violation of due process with a new sensitivity. Two cases with religious overtones, not directly connected to the religion clauses of the First Amendment, were decided in a way that promoted free religious choice. One involved a state ban on teaching students in any other language but English. Although a product of the wartime hatred of Germany, the state ban intruded upon schools set up by German Lutherans in Nebraska. The Court invalidated the law as a violation of the liberty of parents to obtain such instruction and the teacher's right to offer it. Catholic parochial schools were the target in the second case: a Ku Klux Klan-sponsored law in Oregon required all students from eight to sixteen to attend public schools. The Court concluded that the liberty of parents to educate their children had been abridged. These early cases reflect a sensitivity to the religious concerns that lie behind them.

In 1925, the Supreme Court, without much discussion, made the free speech provisions of the First Amendment binding upon the states and began the task of making the Bill of Rights applicable to the states. In regard to the religion clauses, the first definitive step was taken in 1940.

These are the bare bones of the story of how the Supreme Court took the guarantees found in the federal Bill of Rights and nationalized them through its interpretation of the due process clause of the Fourteenth Amendment. Critics continue to argue that the story reveals a Supreme Court improperly intruding upon the constitutional rights of states, and nowhere has this criticism been more prevalent than in the area of the religion clauses of the First Amendment.

The readings here are designed to present the work of the Supreme Court for your evaluation and inspection. You will find the opinions really quite accessible. Often the Justices argue the key points among themselves and thus reflect the differences in the society as a whole.

In Chapter Five you will encounter the basic cases involved in the Court's application of the religion clauses to the states. Since interpretation of the First Amendment was sparse prior to its nationalization, the cases also provide an introduction to the Supreme Court's reading of the religion clauses in a society much changed from the one which gave them birth.

Chapter Six focuses on the meaning of the free exercise clause and what justification it provides in shielding the believer from the operation of law. It tends to show a Court that is sensitive to the dilemma posed by conflicting personal obligations.

Chapter Seven looks at the no-establishment clause as it relates to two controversial areas – school prayer and financial assistance. Here we must come to grips with what action can be said to tend to establish religion.

Finally, Chapter Eight concludes with an intriguing series of cases that ask whether relatively consistent historical practice should be accommodated within an interpretation of the First Amendment. Before we answer too quickly, we should ask ourselves what would a constitution be worth if its function was solely to sanctify what has been done? And would we be comfortable with all the social solutions of our ancestors?

Chapter Five

The Basic Cases: What Limits Do the Religion Clauses Place Upon the States?

Despite the hopes of a few of the framers of the Fourteenth Amendment and the eager advocacy of Justice John Marshall Harlan, the First Amendment and the Bill of Rights were viewed as checks only on the federal government until the mid-1920s. In 1925 the Court held that the right of free speech was protected against hostile state action by the Fourteenth Amendment. This decision opened the door to a relatively consistent development over the next forty-four years in which most of the protections found in the Bill of Rights were applied to the states.

Cantwell v. Connecticut in 1940 made the free exercise clause a standard for evaluating state action (Reading 31). It reversed the convictions of Jehovah's Witnesses for purveying their religious views. Then, in a dramatic reversal of an earlier decision, the Court in *West Virginia v. Barnette*, again responding to objections from Jehovah's Witnesses, upheld a religious objection to a compulsory flag salute in the public schools (Reading 32). The Justices skirted the question of whether religious conviction itself was a legitimate basis for exemption from valid civil law; instead they talked generally about protecting a freedom of expression from repressive state law.

In 1947 in *Everson v. Board of Education* the Court made the portion of the First Amendment prohibiting laws respecting an establishment of religion binding upon the states (Reading 33). When a state allowed the use of school time and school buildings for religious exercises, the Justices found a violation of the no establishment clause (Reading 34). But when a state simply released students to attend religious classes, the Court found no violation (Reading 35).

The final case in this chapter deals with Sunday closing laws. In the litigation, the Justices determined that the practice could be supported by secular reasons, and, as such, did not violate the First Amendment (Reading 36).

Although there is little in the cases explaining how and why the Court applied the religion clauses to the states, you might, as you read the cases, speculate on the question.

Reading 31: From *Cantwell v. Connecticut*, 310 U.S. 296 (1940)

Mr. Justice Roberts delivered the opinion of the Court:

Newton Cantwell and his two sons, Jesse and Russell, members of a group known as Jehovah's Witnesses, and claiming to be ordained ministers, were arrested in New Haven, Connecticut, and each was charged by information in five counts, with statutory and common law offenses....

The statute under which the appellants were charged provides:

"No person shall solicit money, services, subscriptions or any valuable thing for any alleged religious, charitable or philanthropic cause, from other than a member of the organization for whose benefit such person is soliciting or within the county in which such person or organization is located unless such cause shall have been approved by the secretary of the public welfare council. Upon application of any person in behalf of such cause, the secretary shall determine whether such cause is a religious one or is a bona fide object of charity or philanthropy and conforms to reasonable standards of efficiency and integrity, and, if he shall so find, shall approve the same and issue to the authority in charge a certificate to that effect. Such certificate may be revoked at any time. Any person violating any provision of this section shall be fined not more than one hundred dollars or imprisoned not more than thirty days or both."

The appellants claimed that their activities were not within the statute but consisted only of distribution of books, pamphlets, and periodicals. The State Supreme Court construed the finding of the trial court to be that "in addition to the sale of the books and the distribution of the pamphlets the defendants were also soliciting contributions or donations of money for an alleged religious cause, and thereby came within the purview of the statute." It overruled the contention that

the Act, as applied to the appellants, offends the due process clause of the Fourteenth Amendment, because it abridges or denies religious freedom and liberty of speech and press. The court stated that it was the solicitation that brought the appellants within the sweep of the Act and not their other activities in the dissemination of literature. It declared the legislation constitutional as an effort by the State to protect the public against fraud and imposition in the solicitation of funds for what purported to be religious, charitable, or philanthropic causes. . . .

First. We hold that the statute, as construed and applied to the appellants, deprives them of their liberty without due process of law in contravention of the Fourteenth Amendment. The fundamental concept of liberty embodied in that Amendment embraces the liberties guaranteed by the First Amendment. The First Amendment declares that Congress shall make no law respecting an establishment of religion or prohibiting the free exercise thereof. The Fourteenth Amendment has rendered the legislatures of the states as incompetent as Congress to enact such laws. The constitutional inhibition of legislation on the subject of religion has a double aspect. On the one hand, it forestalls compulsion by law of the acceptance of any creed or the practice of any form of worship. Freedom of conscience and freedom to adhere to such religious organization or form of worship as the individual may choose cannot be restricted by law. On the other hand, it safeguards the free exercise of the chosen form of religion. Thus the Amendment embraces two concepts,—freedom to believe and freedom to act. The first is absolute but, in the nature of things, the second cannot be. Conduct remains subject to regulation for the protection of society. The freedom to act must have appropriate definition to preserve the enforcement of that protection. In every case the power to regulate must be so exercised as not, in attaining a permissable end, unduly to infringe the protected freedom. No one would contest the proposition that a state may not, by statute, wholly deny the right to preach or to disseminate religious views. Plainly such a previous and absolute restraint would violate the terms of the guaranty. It is equally clear that a state may by general and nondiscriminatory legislation regulate the times, the places, and the manner of soliciting upon its streets, and of holding meetings thereon; and may in other respects safeguard the peace, good order and comfort of the community, without unconstitutionally invading the liberties protected by the Fourteenth Amendment. The appellants are right in their insistence that the Act in question is not such a regulation. If a certificate is procured, solicitation is permitted without restraint but, in the absence of a certificate, solicitation is altogether prohibited. . . .

It will be noted . . . that the Act requires an application to the secretary of the public welfare council of the State; . . . He is authorized to withhold his approval if he determines that the cause is not a religious one. Such a censorship of religion as the means of determining its right to survive is a denial of liberty protected by the First Amendment and included in the liberty which is within the protection of the Fourteenth.

The State asserts that if the licensing officer acts arbitrarily, capriciously, or corruptly, his action is subject to judicial correction. Counsel refer to the rule prevailing in Connecticut that the decision of a commission or an administrative official will be reviewed upon a claim that "it works material damage to individual or corporate rights, or invades or threatens such rights, or is so unreasonable as to justify judicial intervention, or is not consonant with justice, or that a legal duty has not been performed." . . . It is suggested that the statute is to be read as requiring the officer to issue a certificate unless the cause in question is clearly not a religious one; and that if he violates his duty his action will be corrected by a court.

To this suggestion there are several sufficient answers. The line between a discretionary and a ministerial act is not always easy to mark and the statute has not been construed by the State court to impose a mere ministerial duty on the secretary of the welfare council. Upon his decision as to the nature of the cause, the right to solicit depends. Moreover, the availability of a judicial remedy for abuses in the system of licensing still leaves that system one of previous restraint which, in the field of free speech and press, we have held inadmissible. A statute authorizing previous restraint upon the exercise of the guaranteed freedom by judicial decision after trial is as obnoxious to the Constitution as one providing for like restraint by administrative action.

Nothing we have said is intended even remotely to imply that, under the cloak of religion, persons may, with impunity, commit frauds upon the public. . . . But to condition the solicitation of aid for the perpetuation of religious views or systems upon a license, the grant of which rests in the exercise of a determination by state authority as to what is a religious cause, is to lay a forbidden burden upon the exercise of liberty protected by the Constitution. . . .

In the realm of religious faith, and in that of political belief, sharp differences arise. In both fields the tenets of one man may seem the rankest error to his neighbor. To persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement. But the people of this nation have ordained in the light of history, that, in spite of the probability of excesses and abuses, these liberties are, in the long view, essential to enlightened opinion and right conduct on the part of the citizens of a democracy. . . .

Reading 32: From *West Virginia v. Barnette*, 319 U.S. 624 (1943)

Mr. Justice Jackson delivered the opinion of the Court:

. . .

The Board of Education on January 9, 1942, adopted a resolution containing recitals taken largely from the Court's Gobitis opinion and ordering that the salute to the flag become "a regular part of the program of activities in the public schools," that all teachers and pupils "shall be required to participate in the salute honoring the Nation represented by the Flag; provided, however, that refusal to salute the Flag be regarded as an Act of insubordination, and shall be dealt with accordingly."

The resolution originally required the "commonly accepted salute to the Flag" which it defined. Objections to the salute as "being too much like Hitler's" were raised by the Parent and Teachers Association, the Boy and Girl Scouts, the Red Cross, and the Federation of Women's Clubs. Some modification appears to have been made in deference to these objections, but no concession was made to Jehovah's Witnesses. What is now required is the "stiff-arm" salute, the saluter is to keep the right hand raised with palm turned up while the following is repeated: "I pledge allegiance to the Flag of the United States of America and to the Republic for which it stands; one Nation, indivisible, with liberty and justice for all."

Failure to conform is "insubordination" dealt with by expulsion. Readmission is denied by statute until compliance.

Appellees, citizens of the United States and of West Virginia, brought suit in the United States District Court for themselves and others similarly situated asking its injunction to restrain enforcement of these laws and regulations against Jehovah's Witnesses. The Witnesses are an unincorporated body teaching that the obligation imposed by law of God is superior to that of laws enacted by temporal government. Their religious beliefs include a literal version of Exodus, Chapter 20, verses 4 and 5, which says: "Thou shalt not make unto thee any graven image, or any likeness of anything that is in heaven above, or that is in the earth beneath, or that is in the water under the earth; thou shalt not bow down thyself to them, nor serve them." They consider that the flag is an "image" within this command. For this reason they refuse to salute it. . . .

We are dealing with a compulsion of students to declare a belief. They are not merely made acquainted with the flag salute so that they may be informed as to what it is or even what it means. The issue here is whether this slow and easily neglected route to aroused loyalties constitutionally may be short-cut by substituting a compulsory salute and slogan.

To sustain the compulsory flag salute we are required to say that a Bill of Rights which guards the individual's right to speak his own mind, left it open to public authorities to compel him to utter what is not in his mind.

While religion supplies appellees' motive for enduring the discomforts of making the issue in this case, many citizens who do not share these religious views hold such a compulsory rite to infringe constitutional liberty of the individual. It is necessary to inquire whether non-conformist beliefs will exempt from the duty to salute unless we first find power to make the salute a legal duty. . . .

The Fourteenth Amendment, as now applied to the States, protects the citizen against the State itself and all of its creatures—Boards of Education not excepted. These have, of course, important, delicate, and highly discretionary functions, but none that they may not perform within the limits of the Bill of Rights. That they are educating the young for citizenship is reason for scrupulous protection of Constitutional freedoms of the individual, if we are not to strangle the free mind at its source and teach youth to discount important principles of our government as mere platitudes. . . .

The very purpose of a Bill of Rights was to withdraw certain subjects from the vicissitudes of political controversy, to place them beyond the reach of majorities and officials and to establish them as legal principles to be applied by the courts. One's right to life, liberty, and property, to free speech, a free press, freedom of worship and assembly, and other fundamental rights may not be submitted to vote; they depend on the outcome of no elections. . . .

It is important to note that while it is the Fourteenth Amendment which bears directly upon the State it is the more specific limiting principles of the First Amendment that finally govern this case. . . .

There is no mysticism in the American concept of the State or of the nature or origin of its authority. We set up government by consent of the governed, and the Bill of Rights denies those in power any legal opportunity to coerce that consent. Authority here is to be controlled by public opinion, not public opinion by authority.

The case is made difficult not because the principles of its decision are obscure but because the flag involved is our own. Nevertheless, we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. . . .

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

We think the action of the local authorities in compelling the flag salute and pledge transcends constitutional limitations on their power and invades the sphere of intellect and spirit which it is the purpose of the First Amendment to our Constitution to reserve from all official control....

Mr. Justice Frankfurter, dissenting:

One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution. Were my purely personal attitude relevant I should wholeheartedly associate myself with the general libertarian views in the Court's opinion, representing as they do the thought and action of a lifetime. But as judges we are neither Jew nor Gentile, neither Catholic nor agnostic. We owe equal attachment to the Constitution and are equally bound by our judicial obligations whether we derive our citizenship from the earliest or the latest immigrants to these shores. As a member of this Court I am not justified in writing my private notions of policy into the Constitution, no matter how deeply I may cherish them or how mischievous I may deem their disregard....

I cannot bring my mind to believe that the "liberty" secured by the Due Process Clause gives this Court authority to deny to the State of West Virginia the attainment of that which we all recognize as a legitimate legislative end, namely, the promotion of good citizenship, by employment of the means here chosen.

Not so long ago we were admonished that "the only check upon our own exercise of power is our own sense of self-restraint. For the removal of unwise laws from the statute books appeal lies not to the courts but to the ballot and to the processes of democratic government." ...

The admonition that judicial self-restraint alone limits arbitrary exercise of our authority is relevant every time we are asked to nullify legislation. The Constitution does not give us greater veto power when dealing with one phase of "liberty" than with another, or when dealing with grade school regulations than with college regulations that offend conscience....

Conscientious scruples, all would admit, cannot stand against every legislative compulsion to do positive acts in conflict with such scruples....

What one can say with assurance is that the history out of which grew constitutional provisions for religious equality and the writings of the great exponents of religious freedom—Jefferson, Madison, John Adams, Benjamin Franklin—are totally wanting in justification for a claim by dissidents of exceptional immunity from civic measures of general applicability, measures not in fact disguised assaults upon such dissident views....

The constitutional protection of religious freedom terminated disabilities, it did not create new privileges. It gave religious equality, not civil immunity. Its essence is freedom from conformity to religious dogma, not freedom from conformity to law because of religious dogma....

An act compelling profession of allegiance to a religion, no matter how subtly or tenuously promoted, is bad. But an act promoting good citizenship and national allegiance is within the domain of governmental authority and is therefore to be judged by the same considerations of power and of constitutionality as those involved in the many claims of immunity from civil obedience because of religious scruples.

That claims are pressed on behalf of sincere religious convictions does not of itself establish their constitutional validity. Nor does waving the banner of religious freedom relieve us from examining into the power we are asked to deny the states. Otherwise the doctrine of separation of church and state, so cardinal in the history of this nation and for the liberty of our people, would mean not the disestablishment of a state church but the establishment of all churches and of all religious groups....

Law is concerned with external behavior and not with the inner life of man. It rests in large measure upon compulsion....

Compelling belief implies denial of opportunity to combat it and to assert dissident views. Such compulsion is one thing. Quite another matter is submission to conformity of action while denying its wisdom or virtue and with ample opportunity for seeking its change or abrogation....

That which to the majority may seem essential for the welfare of the state may offend the consciences of a minority. But, so long as no inroads are made upon the actual exercise of religion by the minority, to deny the political power of the majority to enact laws concerned with civil matters, simply because they may offend the consciences of a minority, really means that the consciences of a minority are more sacred and more enshrined in the Constitution than the consciences of a majority....

Of course patriotism cannot be enforced by the flag salute. But neither can the liberal spirit be enforced by judicial invalidation of illiberal legislation....

Reliance for the most precious interests of civilization, therefore must be found outside of their vindication in courts of law. Only a persistent positive translation of the faith of a free society into the convictions and habits and actions of a community is the ultimate reliance against unabated temptations to fetter the human spirit.

Reading 33: From *Everson v. Board of Education*, 330 U.S. 1 (1947)

Mr. Justice Black delivered the opinion of the Court.

A New Jersey statute authorizes its local school districts to make rules and contracts for the transportation to and from schools. The appellee, a township board of education, acting pursuant to this statute, authorized reimbursement to parents of money expended by them for the bus transportation of their children on regular busses operated by the public transportation system. Part of this money was for the payment of transportation of some children in the community to Catholic parochial schools. These church schools give their students, in addition to secular education, regular religious instruction conforming to the religious tenets and modes of worship of the Catholic Faith. The superintendent of these schools is a Catholic priest.

The appellant, in his capacity as a district taxpayer, filed suit in a State court challenging the right of the Board to reimburse parents of parochial school students. He contended that the statute and the resolution passed pursuant to it violated both the State and the Federal Constitutions....

The only contention here is that the State statute and the resolution, insofar as they authorized reimbursement to parents of children attending parochial schools, violate the Federal Constitution....

The statute and the resolution forced inhabitants to pay taxes to help support and maintain schools which are dedicated to, and which regularly teach, the Catholic Faith. This is alleged to be a use of State power to support church schools contrary to the prohibition of the First Amendment which the Fourteenth Amendment made applicable to the states....

Whether this New Jersey law is one respecting an "establishment of religion" requires an understanding of the meaning of that language, particularly with respect to the imposition of taxes. Once again, therefore, it is not inappropriate briefly to review the background and environment of the period in which that constitutional language was fashioned and adopted.

A large proportion of the early settlers of this country came here from Europe to escape the bondage of laws which compelled them to support and attend government favored churches. The centuries immediately before and contemporaneous with the colonization of America had been filled with turmoil, civil strife, and persecutions, generated in large part by established sects determined to maintain their absolute political and religious supremacy....

These practices of the old world were transplanted to and began to thrive in the soil of the new America....

Catholics found themselves hounded and proscribed because of their faith; Quakers who followed their conscience went to jail; Baptists were peculiarly obnoxious to certain dominant Protestant sects; men and women of varied faiths who happened to be in a minority in a particular locality were persecuted because they steadfastly persisted in worshipping God only as their own consciences dictated. And all of these dissenters were compelled to pay tithes and taxes to support government-sponsored churches whose ministers preached inflammatory sermons designed to strengthen and consolidate the established faith by generating a burning hatred against dissenters.

These practices became so commonplace as to shock the freedom-loving colonials into a feeling of abhorrence. The imposition of taxes to pay ministers' salaries and to build and maintain churches and church property aroused their indignation. It was these feelings which found expression in the First Amendment. No one locality and no one group throughout the Colonies can rightly be given entire credit for having aroused the sentiment that culminated in adoption of the Bill of Rights' provisions embracing religious liberty. But Virginia, where the established church had achieved a dominant influence in political affairs and where many excesses attracted wide public attention, provided a great stimulus and able leadership for the movement. The people there, as elsewhere, reached the conviction that individual religious liberty could be achieved best under a government which was stripped of all power to tax, to support, or otherwise to assist any or all religions, or to interfere with the beliefs of any religious individual or group.

The movement toward this end reached its dramatic climax in Virginia in 1785-86 when the Virginia legislative body was about to renew Virginia's tax levy for the support of the established church. Thomas Jefferson and James Madison led the fight against this tax. Madison wrote his great Memorial and Remonstrance against the law. In it, he eloquently argued that a true religion did not need the support of law; that no person, either believer or non-believer, should be taxed to support a religious institution of any kind; that the best interest of a society required that the minds of men always be wholly free; and that cruel persecutions were the inevitable result of government-established religions. Madison's Remonstrance received strong support throughout Virginia, and the Assembly postponed consideration of the proposed tax measure until its next session. When the proposal came up for consideration at that session, it not only died in committee, but the Assembly enacted the famous "Virginia Bill for Religious Liberty" originally written by Thomas Jefferson....

This Court has previously recognized that the provisions of the First Amendment, in the drafting and adoption of which Madison and Jefferson played such leading roles, had the same objective and were intended to provide the same protection against governmental intrusion on religious liberty as

the Virginia statute.... Prior to the adoption of the Fourteenth Amendment, the First Amendment did not apply as a restraint against the states. Most of them did soon provide similar constitutional protections for religious liberty. But some states persisted for about half a century in imposing restraints upon the free exercise of religion and in discriminating against particular religious groups. In recent years, so far as the provision against the establishment of a religion is concerned, the question has most frequently arisen in connection with proposed state aid to church schools and efforts to carry on religious teachings in the public schools in accordance with the tenets of a particular sect. Some churches have either sought or accepted state financial support for their schools. Here again the efforts to obtain state aid or acceptance of it have not been limited to any one particular faith. The state courts, in the main, have remained faithful to the language of their own constitutional provisions designed to protect religious freedom and to separate religions and governments. Their decisions, however, show the difficulty in drawing the line between tax legislation which provides funds for the welfare of the general public and that which is designed to support institutions which teach religion.

The meaning and scope of the First Amendment, preventing establishment of religion or prohibiting the free exercise thereof, in the light of its history and the evils it was designed to suppress, have been several times elaborated by the decisions of this court prior to the application of the First Amendment to the states by the Fourteenth. The broad meaning given the Amendment by these earlier cases has been accepted by this Court in its decisions concerning an individual's religious freedom rendered since the Fourteenth Amendment was interpreted to make the prohibitions of the First applicable to state action abridging religious freedom. There is every reason to give the same application and broad interpretation to the "establishment of religion" clause.

The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or non-attendance. No tax in any amount, large or small, can be levied to support any religious activities or institutions, whatever form they may adopt to teach or practice religion. Neither a state nor the Federal Government can, openly or secretly, participate in the affairs of any religious organizations or groups and vice versa. In the words of Jefferson, the clause against establishment of religion by law was intended to erect "a wall of separation between Church and State"....

We must consider the New Jersey statute in accordance with the foregoing limitations imposed by the First Amendment. But we must not strike that state statute down if it is within the State's constitutional power even though it approaches the verge of that power.... New Jersey cannot consistently with the "establishment of religion" clause of the First Amendment contribute tax-raised funds to the support of an institution which teaches the tenets and faith of any church....

We must be careful, in protecting the citizens of New Jersey against state established churches, to be sure that we do not inadvertently prohibit New Jersey from extending its general state law benefits to all its citizens without regard to their religious belief.

Measured by these standards, we cannot say that the First Amendment prohibits New Jersey from spending tax-raised funds to pay the bus fares of parochial school pupils as a part of a general program under which it pays the fares of pupils attending public and other schools. It is undoubtedly true that children are helped to get to church schools. There is even a possibility that some of the children might not be sent to the church schools if the parents were compelled to pay their children going to and from church pockets when transportation to a public school would have been paid for by the State....

Similarly, parents might be reluctant to permit their children to attend schools which the state had cut off from such general government services as ordinary police and fire protection, connections for sewage disposal, public highways and sidewalks. Of course, cutting off church schools from these services, so separate and so indisputably marked off from the religious function, would make it far more difficult for the schools to operate. But such is obviously not the purpose of the First Amendment. That Amendment requires the state to be a neutral in its relations with groups of religious believers and nonbelievers; it does not require the state to be their adversary. State power is no more to be used so as to handicap religions than it is to favor them.

This Court has said that parents may, in the discharge of their duty under state compulsory education laws, send their children to a religious rather than a public school if the school meets the secular educational requirements which the state has power to impose....

It appears that these parochial schools meet New Jersey's requirements. The State contributes no money to the schools. It does not support them. Its legislation, as applied, does no more than provide a general program to help parents get their children, regardless of their religion, safely and expeditiously to and from accredited schools.

The First Amendment has erected a wall between church and state. That wall must be kept high and impregnable. We

could not approve the slightest breach. New Jersey has not breached it here.

Affirmed.

Mr. Justice Jackson, dissenting.

I find myself, contrary to first impressions, unable to join in this decision....

The Court's opinion marshals every argument in favor of state aid and puts the case in its most favorable light, but much of its reasoning confirms my conclusions that there are no good grounds upon which to support the present legislation....

The court sustains this legislation by assuming two deviations from the facts of this particular case; first, it assumes a state of facts the record does not support, and secondly, it refuses to consider facts which are inescapable on the record....

What the Township does, and what the taxpayer complains of, is at stated intervals to reimburse parents for the fares paid, provided the children attend either public schools or Catholic Church schools. [illegible]s expenditure of tax funds has no possible effect on the ch[illegible] safety or expedition in transit. As passengers on the public busses they travel as fast and no faster, and are as safe and no safer, since their parents are reimbursed as before.

In addition to thus assuming a type of service that does not exist, the Court also insists that we must close our eyes to a discrimination which does exist. The resolution which authorizes disbursement of this taxpayer's money limits reimbursement to those who attend public schools and Catholic schools. That is the way the Act is applied to this taxpayer....

If we are to decide this case on the facts before us, our question is simply this: Is it constitutional to tax this complainant to pay the cost of carrying pupils to Church schools of one specified denomination? ...

The Court's holding is that this taxpayer has no grievance because the state has decided to make the reimbursement a public purpose and therefore we are bound to regard it as such. I agree that this Court has left, and always should leave to each state, great latitude in deciding for itself, in the light of its own conditions, what shall be public purposes....

But it cannot make public business of religious worship or instruction, or of attendance at religious institutions of any character.... The effect of the religious freedom Amendment to our Constitution was to take every form of propagation of religion out of the realm of things which could directly or indirectly be made public business and thereby be supported in whole or in part at taxpayers' expense. That is a difference which the Constitution sets up between religion and almost every other subject matter of legislation, a difference which goes to the very root of religious freedom and which the Court is overlooking today. This freedom was first in the Bill of Rights because it was first in the forefathers' minds; it was set forth in absolute terms, and its strength is its rigidity. It was intended not only to keep the states' hands out of religion, but to keep religion's hands off the state, and, above all, to keep bitter religious controversy out of public life by denying to every denomination any advantage from getting control of public policy or the public purse. Those great ends I cannot but think are immeasurably compromised by today's decision.

This policy of our Federal Constitution has never been wholly pleasing to most religious groups. They all are quick to invoke its protections; they all are irked when they feel its restraints....

Mr. Justice Rutledge, with whom Mr. Justice Frankfurter, Mr. Justice Jackson and Mr. Justice Burton agree, dissenting.

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." ...

Not simply an established church, but any law respecting an establishment of religion is forbidden. The Amendment was broadly but not loosely phrased. It is the compact and exact summation of its author's views formed during his long struggle for religious freedom. In Madison's own words characterizing Jefferson's Bill for Establishing Religious Freedom, the guaranty he put in our national charter, like the bill he piloted through the Virginia Assembly, was "a Model of technical precision, and perspicuous brevity." Madison could not have confused "church" and "religion," or "an established church" and "an establishment of religion."

The Amendment's purpose was not to strike merely at the official establishment of a single sect, creed or religion, outlawing only a formal relation such as had prevailed in England and some of the colonies. Necessarily it was to uproot all such relationships. But the object was broader than separating church and state in this narrow sense. It was to create a complete and permanent separation of the spheres of religious activity and civil authority by comprehensively forbidding every form of public aid or support for religion....

"Religion" appears only once in the Amendment. But the word governs two prohibitions and governs them alike. It does not have two meanings, one narrow to forbid "an establishment" and another, much broader, for securing "the free exercise thereof"....

"Religion" and "establishment" were not used in any formal or technical sense. The prohibition broadly forbids state support, financial or other, of religion in any guise, form or degree. It outlaws all use of public funds for religious purposes.

No provision of the Constitution is more closely tied to or given content by its generating history than the religious clause of the First Amendment. It is at once the refined product and the terse summation of that history. The history includes not only Madison's authorship and the proceedings before the First Congress, but also the long and intensive strug-

gle for religious freedom in America, more especially in Virginia, of which the Amendment was the direct culmination. In the documents of the times, particularly of Madison, who was leader in the Virginia struggle before he became the Amendment's sponsor, but also in the writings of Jefferson and others and in the issues which engendered them is to be found irrefutable confirmation of the Amendment's sweeping content.

For Madison, as also for Jefferson, religious freedom was the crux of the struggle for freedom in general. . . .

All the great instruments of the Virginia struggle for religious liberty thus became warp and woof of our constitutional tradition, not simply by the course of history, but by the common unifying force of Madison's life, thought and sponsorship. He epitomized the whole of that tradition in the Amendment's compact, but nonetheless comprehensive phrasing. . . .

Today, apart from efforts to inject religious training or exercises and sectarian issues into the public schools, the only serious surviving threat to maintaining that complete and permanent separation of religion and civil power which the First Amendment commands is through use of the taxing power to support religion, religious establishments, or establishments having a religious foundation whatever their form or special religious function.

Does New Jersey's action furnish support for religion by use of the taxing power? Certainly it does, if the test remains undiluted as Jefferson and Madison made it, that money taken by taxation from one is not to be used or given to support another's religious training or belief, or indeed one's own. Today as then the furnishing of "contributions of money for the propagation of opinions which he disbelieves" is the forbidden exaction; and the prohibition is absolute for whatever measure brings that consequence and whatever amount may be sought or given to that end.

The funds used here were raised by taxation. The Court does not dispute, nor could it, that their use does in fact give aid and encouragement to religious instruction. It only concludes that this aid is not "support' in law. But Madison and Jefferson were concerned with aid and support in fact, not as a legal conclusion "entangled in precedents." . . Here parents pay money to send their children to parochial schools and funds raised by taxation are used to reimburse them. This not only helps the children to get to school and the parents to send them. It aids them in a substantial way to get the very thing which they are sent to the particular school to secure, namely, religious training and teaching.

Believers of all faiths, and others who do not express their feeling toward ultimate issues of existence in any creedal form, pay the New Jersey tax. . . .

New Jersey's action therefore exactly fits the type of exaction and the kind of evil at which Madison and Jefferson struck. . . .

But we are told that the New Jersey statute is valid in its present application because the appropriation is for a public, not a private purpose, namely, the promotion of education, and the majority accept this idea in the conclusion that all we have here is "public welfare legislation." If that is true and the Amendment's force can be thus destroyed, what has been said becomes all the more pertinent. For then there could be no possible objection to more extensive support of religious education by New Jersey. . . .

The reasons underlying the Amendment's policy have not vanished with time or diminished in force. Now as when it was adopted the price of religious freedom is double. It is that the church and religion shall live both within and upon that freedom. There cannot be freedom of religion, safeguarded by the state, and intervention by the church or its agencies in the state's domain or dependency on its largesse. . . .

Two great drives are constantly in motion to abridge, in the name of education, the complete division of religion and civil authority which our forefathers made. One is to introduce religious education and observances into the public schools. The other, to obtain public funds for the aid and support of various private religious schools. . . .

Reading 34: From *McCollum v. Board of Education*, 333 U.S. 203 (1948)

Mr. Justice Black delivered the opinion of the Court.

This case relates to the power of a state to utilize its tax-supported public school system in aid of religious instruction insofar as that power may be restricted by the First and Fourteenth Amendments to the Federal Constitution.

The appellant, Vashti McCollum, began this action for mandamus against the Champaign Board of Education in the Circuit Court of Champaign County, Illinois. Her asserted interest was that of a resident and taxpayer of Champaign and of a parent whose child was then enrolled in the Champaign public schools. . . .

Appellant's petition for mandamus alleged that religious teachers, employed by private religious groups, were permitted to come weekly into the school buildings during the regular hours set apart for secular teaching, and then and there for a period of thirty minutes substitute their religious teaching for

the secular education provided under the compulsory education law. The petitioner charged that this joint public-school religious-group program violated the First and Fourteenth Amendments to the United States Constitution. The prayer of her petition was that the Board of Education be ordered to "adopt and enforce rules and regulations prohibiting all instruction in and teaching of religious education in all public schools in Champaign School District Number 71, . . ."

Although there are disputes between the parties as to various inferences that may or may not properly be drawn from the evidence concerning the religious program, the following facts are shown by the record without dispute. In 1940 interested members of the Jewish, Roman Catholic, and a few of the Protestant faiths formed a voluntary association called the Champaign Council on Religious Education. They obtained permission from the Board of Education to offer classes in religious instruction to public school pupils in grades four to nine inclusive. Classes were made up of pupils whose parents signed printed cards requesting that their children be permitted to attend; they were held weekly, thirty minutes for the lower grades, forty-five minutes for the higher. The council employed the religious teachers at no expense to the school authorities, but the instructors were subject to the approval and supervision of the superintendent of schools. The classes were taught in three separate religious groups by Protestant teachers, Catholic priests, and a Jewish rabbi, although for the past several years there have apparently been no classes instructed in the Jewish religion. Classes were conducted in the regular classroom of the school building. Students who did not choose to take the religious instruction were not released from public school duties; they were required to leave their classrooms and go to some other place in the school building for pursuit of their secular studies. On the other hand, students who were released from secular study for the religious instructions were required to be present at the religious classes. Reports of their presence or absence were to be made to their secular teachers.

The foregoing facts, without reference to others that appear in the record, show the use of tax-supported property for religious instruction and the close cooperation between the school authorities and the religious council in promoting religious education. The operation of the state's compulsory education system thus assists and is integrated with the program of religious instruction carried on by separate religious sects. Pupils compelled by law to go to school for secular education are released in part from their legal duty upon the condition that they attend the religious classes. This is beyond all question a utilization of the tax-established and tax-supported public school system to aid religious groups to spread their faith. And it falls squarely under the ban of the First Amendment (made applicable to the States by the Fourteenth) as we interpreted it in *Everson v. Board of Education*. . . .

Here not only are the state's tax-supported public school buildings used for the dissemination of religious doctrines. The State also affords sectarian groups an invaluable aid in that it helps to provide pupils for their religious classes through use of the state's compulsory public school machinery. This is not separation of Church and State.

The cause is reversed and remanded to the State Supreme Court for proceedings not inconsistent with this opinion. . . .

Mr. Justice Reed, dissenting. . . .

From the tenor of the opinions I conclude that their teachings are that any use of a pupil's school time whether that use is on or off the school grounds, with the necessary school regulations to facilitate attendance, falls under the ban. . . .

From the holding and the language of the opinions, I can only deduce that religious instruction of public school children during school hours is prohibited. The history of American education is against such an interpretation of the First Amendment. . . .

The phrase "an establishment of religion" may have been intended by Congress to be aimed only at a state church. . . .

Passing years, however, have brought about the acceptance of a broader meaning, although never until today, I believe, has this Court widened its interpretation to any such degree as holding that recognition of the interest of our nation in religion, through the granting, to qualified representatives of the principal faiths, of opportunity to present religion as an optional, extracurricular subject during released school time in public school buildings, was equivalent to an establishment of religion. A reading of the general statements of eminent statesmen of former days, referred to in the opinions in this case and in *Everson v. Board of Education* will show that circumstances such as those in this case were far from the minds of the authors. The words and spirit of those statements may be wholeheartedly accepted without in the least impugning the judgment of the State of Illinois.

Mr. Jefferson, as one of the founders of the University of Virginia, a school which from its establishment in 1819 has been wholly governed, managed and controlled by the State of Virginia, was faced with the same problem that is before this Court today: the question of the constitutional limitation upon religious education in public schools. In his annual report as Rector, to the President and Directors of the Literary Fund, dated October 7, 1822, approved by the Visitors of the University of whom Mr. Madison was one, Mr. Jefferson set forth his views at some length. These suggestions of Mr. Jefferson were adopted and . . . Regulations of the University . . . provided that:

"Should the religious sects of this State, or any of them, according to the invitation held out to them, establish within, or adjacent to, the precincts of the University, schools for instruction in the religion of their sect, the students of the University will be free, and expected to attend religious worship at the establishment of their respective sects, in the morning, and in time to meet their school in the University at its stated hour."

Thus, the "wall of separation between church and State" that Mr. Jefferson built at the University which he founded did not exclude religious education from that school. The difference between the generality of his statements on the separation of church and state and the specificity of his conclusions on education are considerable. A rule of law should not be drawn from a figure of speech.

Mr. Madison's Memorial and Remonstrance against Religious Assessments relied upon by the dissenting Justice in Everson is not applicable here....

The conclusive legislative struggle over this act took place in the fall of 1785 before the adoption of the Bill of Rights. The Remonstrance had been issued before the General Assembly convened and was instrumental in the final defeat of the act, which died in committee. Throughout the Remonstrance, Mr. Madison speaks of the "establishment" sought to be effected by the act. It is clear from its historical setting and its language that the Remonstrance was a protest against an effort by Virginia to support Christian sects by taxation. Issues similar to those raised by the instant case were not discussed. Thus, Mr. Madison's approval of Mr. Jefferson's report as Rector gives, in my opinion, a clearer indication of his views on the constitutionality of religious education in public schools than his general statements on a different subject....

It seems clear to me that the "aid" referred to by the Court in the Everson Case could not have been those incidental advantages that religious bodies, with other groups similarly situated, obtain as a by-product of organized society. This explains the well-known fact that all churches receive "aid" from government in the form of freedom from taxation. The Everson decision itself justified the transportation of children to church schools by New Jersey for safety reasons....

Well-recognized and long-established practices support the validity of the Illinois statute here in question. That statute, as construed in this case, is comparable to those in many states....

The practices of the federal government offer many examples of this kind of "aid" by the state to religion. The Congress of the United States has a chaplain for each House who daily invokes divine blessings and guidance for the proceedings. The armed forces have commissioned chaplains from early days.

Under the Servicemen's Readjustment Act of 1944, eligible veterans may receive training at government expense for the ministry in denominational schools. The schools of the District of Columbia have opening exercises which "include a reading from the Bible without note or comment, and the Lord's prayer."

In the United States Naval Academy and the United States Military Academy, schools wholly supported and completely controlled by the federal government, there are a number of religious activities. Chaplains are attached to both schools. Attendance at church services on Sunday is compulsory at both the Military and Naval Academies....

These facts indicate that both schools since their earliest beginnings have maintained and enforced a pattern of participation in formal worship.

With the general statements in the opinions concerning the constitutional requirement that the nation and the states, by virtue of the First and Fourteenth Amendments, may "make no law respecting an establishment of religion," I am in agreement. But, in the light of the meaning given to those words by the precedents, customs, and practices which I have detailed above, I cannot agree with the Court's conclusion that when pupils compelled by law to go to school for secular education are released from school so as to attend the religious classes, churches are unconstitutionally aided....

For a non-sectarian organization to give the type of instruction here offered cannot be said to violate our rule as to the establishment of religion by the state. The prohibition of enactments respecting the establishment of religion do not bar every friendly gesture between church and state. It is not an absolute prohibition against every conceivable situation where the two may work together, any more than the other provisions of the First Amendment—free speech, free press—are absolutes....

This Court cannot be too cautious in upsetting practices embedded in our society by many years of experience. A state is entitled to have great leeway in its legislation when dealing with the important social problems of its population....

Devotion to the great principle of religious liberty should not lead us into a rigid interpretation of the constitutional guarantee that conflicts with accepted habits of our people. This is an instance where, for me, the history of past practices is determinative of the meaning of a constitutional clause not a decorous introduction to the study of its text.

Reading 35: From *Zorach v. Clauson*, 343 U.S. 306 (1952)

Mr. Justice Douglas delivered the opinion of the Court.

New York City has a program which permits its public schools to release students during the school day so that they may leave the school buildings and school grounds and go to religious centers for religious instruction or devotional exercises. A student is released on written request of his parents. Those not released stay in the classrooms. The churches make weekly reports to the schools, sending a list of children who have been released from public school but who have not reported for religious instruction.

This "released time" program involves neither religious instruction in public school classrooms nor the expenditure of public funds. All costs, including the application blanks, are paid by the religious organizations. The case is therefore unlike Illinois ex rel. *McCollum v. Board of Education*.... In that case the classrooms were turned over to religious instructors. We accordingly held that the program violated the First Amendment which (by reason of the Fourteenth Amendment) prohibits the states from establishing religion or prohibiting its free exercise.

Appellants, who are taxpayers and residents of New York City and whose children attend its public schools, challenge the present law, contending it is in essence not different from the one involved in the McCollum Case.

It takes obtuse reasoning to inject any issue of the "free exercise" of religion into the present case. No one is forced to go to the religious classroom and no religious exercise or instruction is brought to the classrooms of the public schools. A student need not take religious instruction. He is left to his own desires as to the manner or time of his religious devotions, if any.

There is a suggestion that the system involves the use of coercion to get public school students into religious classrooms. There is no evidence in the record before us that supports that conclusion. The present record indeed tells us that the school authorities are neutral in this regard and do no more than release students whose parents so request. If in fact coercion were used, if it were established that any one or more teachers were using their office to persuade or force students to take the religious instruction, a wholly different case would be presented. Hence we put aside that claim of coercion both as respects the "free exercise" of religion and "an establishment of religion" within the meaning of the First Amendment.

Moreover, apart from that claim of coercion, we do not see how New York by this type of "released time" program has made a law respecting an establishment of religion within the meaning of the First Amendment. There is much talk of the separation of Church and State in the history of the Bill of Rights and in the decisions clustering around the First Amendment....

The First Amendment, however, does not say that in every and all respects there shall be a separation of Church and State. Rather, it studiously defines the manner, the specific ways, in which there shall be no concert or union or dependency one on the other. That is the common sense of the matter. Otherwise, the state and religion would be aliens to each other—hostile, suspicious, and even unfriendly. Churches could not be required to pay even property taxes. Municipalities would not be permitted to render police or fire protection to religious groups. Policemen who helped parishioners into their places of worship would violate the Constitution. Prayers in our legislative halls; the appeals to the Almighty in the messages of the Chief Executive; the proclamations making Thanksgiving Day a holiday; "so help me God" in our courtroom oaths—these and all other references to the Almighty that run through our laws, our public rituals, our ceremonies would be flouting the First Amendment. A fastidious atheist or agnostic could even object to the supplication with which the Court opens each session: "God save the United States and this Honorable Court."

We would have to press the concept of separation of Church and State to these extremes to condemn the present law on constitutional grounds. The nullification of this law would have wide and profound effects....

We are a religious people whose institutions presuppose a Supreme Being. We guarantee the freedom to worship as one chooses. We make room for as wide a variety of beliefs and creeds as the spiritual needs of man deem necessary. We sponsor an attitude on the part of government that shows no partiality to any one group and that lets each flourish according to the zeal of its adherents and the appeal of its dogma. When the state encourages religious instruction or cooperates with religious authorities by adjusting the schedule of public events to sectarian needs, it follows the best of our traditions. For it then respects the religious nature of our people and accommodates the public service to their spiritual needs. To hold that it may not would be to find in the Constitution a requirement that the government show a callous indifference to religious groups. That would be preferring those who believe in no religion over those who do believe. Government may not finance religious groups nor undertake religious instruction nor blend secular and sectarian education nor use secular institutions to force one or some religion on any person. But we find no constitutional requirement which makes it necessary for government to be hostile to religion and to throw its weight against efforts to widen the effective scope of religious influence. The government must be neutral when it comes to competition between sects. It may not thrust any sect on any person. It may not make a religious observance compulsory.

It may not coerce anyone to attend church, to observe a religious holiday, or to take religious instruction. But it can close its doors or suspend its operations as to those who want to repair to their religious sanctuary for worship or instruction. No more than that is undertaken here....

We follow the McCollum Case. But we cannot expand it to cover the present released time program unless separation of Church and State means that public institutions can make no adjustments of their schedules to accommodate the religious needs of the people. We cannot read into the Bill of Rights such a philosophy of hostility to religion.

Affirmed....

Mr. Justice Frankfurter, dissenting.

By way of emphasizing my agreement with Mr. Justice Jackson's dissent, I add a few words.

The Court tells us that in the maintenance of its public schools, "[The State government] can close its doors or suspend its operations" so that its citizens may be free for religious devotions or instruction. If that were the issue, it would not rise to the dignity of a constitutional controversy. Of course a State may provide that the classes in its schools shall be dismissed, for any reason, or no reason, on fixed days, or for special occasions. The essence of this case is that the school system did not "close its doors" and did not "suspend its operations." There is all the difference in the world between letting the children out of school and letting some of them out of school into religious classes. If every one is free to make what use he will of time wholly unconnected from schooling required by law—those who wish sectarian instruction devoting it to that purpose, those who have ethical instruction at home, to that, those who study music, to that—then of course there is no conflict with the Fourteenth Amendment....

Mr. Justice Jackson, dissenting.

This released time program is founded upon a use of the State's power of coercion, which, for me, determines its unconstitutionality. Stripped to its essentials, the plan has two stages, first, that the State compel each student to yield a large part of his time for public secular education and, second, that some of it be "released" to him on condition that he devote it to sectarian religious purposes.

No one suggests that the Constitution would permit the State directly to require this "released" time to be spent "under the control of a duly constituted religious body." This program accomplishes that forbidden result by indirection. If public education were taking so much of the pupils' time as to injure the public or the students' welfare by encroaching upon their religious opportunity, simply shortening everyone's school day would facilitate voluntary and optional attendance at Church classes. But that suggestion is rejected upon the ground that if they are made free many students will not go to the Church. Hence, they must be deprived of freedom for this period, with Church attendance put to them as one of the two permissable ways of using it.

The greater effectiveness of this system over voluntary attendance after school hours is due to the truant officer who, if the youngster fails to go to the Church school, dogs him back to the public schoolroom. Here schooling is more or less suspended during the "released time" so the nonreligious attendants will not forge ahead of the churchgoing absentees. But it serves as a temporary jail for a pupil who will not go to Church. It takes more subtlety of mind than I possess to deny that this is governmental constraint in support of religion. It is as unconstitutional, in my view, when exerted by indirection as when exercised forthrightly.

As one whose children, as a matter of free choice, have been sent to privately supported Church schools, I may challenge the Court's suggestion that opposition to this plan can only be antireligious, atheistic, or agnostic. My evangelistic brethren confuse an objection to compulsion with an objection to religion. It is possible to hold a faith with enough confidence to believe that what should be rendered to God does not need to be decided and collected by Caesar.

The day that this country ceases to be free for irreligion it will cease to be free for religion—except for the sect that can win political power. The same epithetical jurisprudence used by the Court today to beat down those who oppose pressuring children into some religion can devise as good epithets tomorrow against those who object to pressuring them into a favored religion. And, after all, if we concede to the State power and wisdom to single out "duly constituted religious" bodies as exclusive alternatives for compulsory secular instruction, it would be logical to also uphold the power and wisdom to choose the true faith among those "duly constituted." We start down a rough road when we begin to mix compulsory public education with compulsory godliness....

The wall which the Court was professing to erect between Church and State has become even more warped and twisted than I expected. Today's judgment will be more interesting to students of psychology and of the judicial processes than to students of constitutional law.

Reading 36: From *McGowan v. Maryland*, 366 U.S. 420 (1961)

Mr. Chief Justice Warren delivered the opinion of the Court.

The issues in this case concern the constitutional validity of Maryland criminal statutes, commonly known as Sunday Closing Laws or Sunday Blue Laws. These statutes, with exceptions to be noted hereafter, generally proscribe all labor, business and other commercial activities on Sunday. The questions presented are whether the classifications within the statutes bring about a denial of equal protection of the law, whether the laws are so vague as to fail to give reasonable notice of the forbidden conduct and therefore violate due process, and whether the statutes are laws respecting an establishment of religion or prohibiting the free exercise thereof....

... Appellants contend that the statutes violate the guarantee of separation of church and state in that the statutes are laws respecting an establishment of religion contrary to the First Amendment, made applicable to the States by the Fourteenth Amendment....

The essence of appellants' "establishment" argument is that Sunday is the Sabbath day of the predominant Christian sects; that the purpose of the enforced stoppage of labor on that day is to facilitate and encourage church attendance; that the purpose of setting Sunday as a day of universal rest is to induce people with no religion or people with marginal religious beliefs to join the predominant Christian sects; that the purpose of the atmosphere of tranquility created by Sunday closing is to aid the conduct of church services and religious observance of the sacred day....

There is no dispute that the original laws which dealt with Sunday labor were motivated by religious forces. But what we must decide is whether present Sunday legislation, having undergone extensive changes from the earliest forms, still retains its religious character....

... Despite the strongly religious origin of these laws, beginning before the eighteenth century, nonreligious arguments for Sunday closing began to be heard more distinctly and the statutes began to lose some of their totally religious flavor....

More recently, further secular justifications have been advanced for making Sunday a day of rest, a day when people may recover from the labors of the week just passed and may physically and mentally prepare for the week's work to come. In England, during the First World War, a committee investigating the health conditions of munitions workers reported that "if the maximum output is to be secured and maintained for any length of time, a weekly period of rest must be allowed.... On economic and social grounds alike this weekly period of rest is best provided on Sunday."

The proponents of Sunday closing legislation are no longer exclusively representatives of religious interests....

Throughout the years, state lgislatures have modified, deleted from and added to their Sunday statutes. As evidenced by the New Jersey laws mentioned above, current changes are commonplace. Almost every State in our country presently has some type of Sunday regulation and over forty possess a relatively comprehensive system....

Throughout this century and longer, both the federal and state governments have oriented their activities very largely toward improvement of the health, safety, recreation and general well-being of our citizens. Numerous laws affecting public health, safety factors in industry, laws affecting hours and conditions of labor of women and children, weekend diversion at parks and beaches, and cultural activities of various kinds, now point the way toward the good life for all. Sunday Closing Laws, like those before us, have become part and parcel of this great governmental concern wholly apart from their original purposes or connotations. The present purpose and effect of most of them is to provide a uniform day of rest for all citizens; the fact that this day is Sunday, a day of particular significance for the dominant Christian sects, does not bar the State from achieving its secular goals. To say that the States cannot prescribe Sunday as a day of rest for these purposes solely because centuries ago such laws had their genesis in religion would give a constitutional interpretation of hostility to the public welfare rather than one of mere separation of church and State....

Questions for Discussion

1. Do you see sufficient justification for using the Cantwell case to make the free exercise provision of the First Amendment binding upon the states?

2. Do you agree that the activity of the Jehovah's Witnesses can properly be described as the free exercise of their religion?

3. In the West Virginia case, do you see merit in Frankfurter's dissent? Why do you think the majority Justices avoided the question of whether an exemption from valid civil law should be granted to those people who are religiously motivated?

4. Evaluate the history the Court relies upon in *Everson*. Do you believe that Reed's dissent in *McCollum* better captures our history? Can you speculate on why the Justices used *Everson* to make the second religious clause, the one on establishment, applicable to the states?

5. A number of members of the High Bench saw no difference in the two release time cases. Do you agree? Why do you think a majority found a difference?

6. Are you attracted to the idea, found in the Sunday closing law cases, that if a secular purpose for a particular activity can be found then there is no violation of the establishment clause? Can the original religious motivation for the legislation simply be ignored?

Chapter Six

Free Exercise of Religion: How Much Room Should Government Allow?

The idea that religious convictions would entitle the believer to claim an exemption from law duly enacted by government had little standing from the seventeenth into the twentieth centuries. Even Roger Williams, that staunch advocate of separation between the two realms, advised his adherents to follow society's secular law. Among the prominent figures in the American past, only James Madison in 1776 suggested that government might have to stay its hand in enforcing obedience to its laws in the face of religious objection. But after 1776, despite his other writing on matters of religion and government, Madison did not continue such advocacy. Contemporary supporters for the early position of Madison are indeed hard to find.

Supreme Court precedent on the matter goes back to *Reynolds v. United States* in 1879, when the Justices rejected the notion that the practice of polygamy as a religious duty was protected by the free exercise clause (Reading 37). That the Justices might not be totally unsympathetic to a less odious claim for exception on grounds of religious belief was suggested in the 1890s. Then the Court justified its reading of a federal contract labor law partially on grounds that to forbid a congregation from hiring a foreign minister might be a violation of the religion clauses in the First Amendment. But as late as 1961, in one of the Sunday closing law cases, the Justices held firm in denying that the state had to accommodate a free exercise claim (Reading 38).

Two years later, however, the Justices did uphold a free exercise claim against a valid civil law (Reading 39). The subject matter made the argument much more appealing than it had been in the Mormon cases, for it involved the question of whether a person with religious objections to working on Saturday should receive unemployment compensation.

Then, in 1970, the Court widened an obvious religious exemption in the Selective Service Law to exempt an individual from the draft who could not claim the religious sanction that the law obviously prescribed (Reading 40).Here, a statutory religious exception was widened by the majority to avoid what it saw as an impermissible limitation in the law.

With changes in the membership of the High Bench, the Court in 1972 again found a religious exception to the general validity of the civil law. Amish families in Wisconsin wanted partial exemption from the compulsory school attendance law, and the majority Justices, impressed with the traditions of the Amish, granted the exemption (Reading 41). The Court, however, tried to limit the reach of its decision.

Almost ten years later the Justices were willing to find another exception for a Jehovah's Witness who objected to working to produce armaments (Reading 42). Again the issue was whether workmen's compensation payments should be made.

Finally, in 1982, even old Amish beliefs did not win the sympathy of the Court. The issue was participation in the social security system by an Amish employer (Reading 43).

As you read the decisions, you may find it useful to keep two larger considerations in mind. First, can you discern some pattern that will help explain when a free exercise claim will supercede a secular legal obligation? Second, the cases upholding such an exemption from valid civil law would, in all likelihood, not survive a test based upon interpreting the religion clauses in the light of eighteenth-century practice; that is, they could not be justified by resorting to a concept of original understanding. Does such a conclusion lead you to the belief that no such exemptions should be granted, or to a view that the Supreme Court is justified in expanding the First Amendment's protection of religious liberty on the basis of its twentieth-century understanding of what is desirable?

Reading 37: From *Reynolds v. United States*, 98 U.S. 145 (1879)

Mr. Chief Justice Waite delivered the opinion of the court.

The assignments of error, when grouped, present the following questions: . . .

5. Should the accused have been acquitted if he married the second time, because he believed it to be his religious duty?

6. Did the court err in that part of the charge which directed the attention of the jury to the consequences of polygamy? . . .

[Reynolds] . . . asked the court to instruct the jury that if they found from evidence that he "was married as charged—if he was married—in pursuance of and in conformity with what he believed at the time to be a religious duty, that the verdict must be 'not guilty.'" This request was refused, and the court did charge "that there must have been a criminal intent, but that if the defendant, under the influence of a religious belief that it was right,—under an inspiration, if you please, that it was right,—deliberately married a second time, having a first wife living, the want of consciousness of evil intent—the want of understanding on his part that he was commiting a crime—did not excuse him; but the law inexorably in such case implies the criminal intent."

Upon this charge and refusal to charge the question is raised, whether religious belief can be accepted as a justification of an overt act made criminal by the law of the land. The inquiry is not as to the power of Congress to prescribe criminal laws for the Territories, but as to the guilt of one who knowingly violates a law which has been properly enacted, if he entertains a religious belief that the law is wrong.

Congress cannot pass a law for the government of the Territories which shall prohibit the free exercise of religion. The first amendment to the Constitution expressly forbids such legislation. Religious freedom is guaranteed everywhere throughout the United States, so far as congressional interference is concerned. The question to be determined is, whether the law now under consideration comes within this prohibition.

The word "religion" is not defined in the Constitution. We must go elsewhere, therefore, to ascertain its meaning, and nowhere more appropriately, we think, than to the history of the times in the midst of which the provision was adopted. The precise point of the inquiry is, what is the religious freedom which has been guaranteed.

Before the adoption of the Constitution, attempts were made in some of the colonies and States to legislate not only in respect to the establishment of religion, but in respect to its doctrines and precepts as well. The people were taxed, against their will, for the support of religion, and sometimes for the support of particular sects to whose tenets they could not and did not subscribe. Punishments were prescribed for a failure to attend upon public worship, and sometimes for entertaining heretical opinions. The controversy upon this general subject was animated in many of the States, but seemed at last to culminate in Virginia. In 1784, the House of Delegates of that State having under consideration "a bill establishing provision for teachers of the Christian religion," postponed it until the next session, and directed that the bill should be published and distributed, and that the people be requested "to signify their opinion respecting the adoption of such a bill at the next session of assembly."

This brought out a determined opposition. Amongst others, Mr. Madison prepared a "Memorial and Remonstrance," which was widely circulated and signed, and in which he demonstrated "that religion, or the duty we owe the Creator," was not within the cognizance of civil government. At the next session the proposed bill was not only defeated, but another, "for establishing religious freedom," drafted by Mr. Jefferson, was passed. In the preamble of this act religious freedom is defined; and after a recital "that to suffer the civil magistrate to intrude his powers into the field of opinion, and to restrain the profession or propagation of principles on supposition of their ill tendency, is a dangerous fallacy which at once destroys all religious liberty," it is declared "that it is time enough for the rightful purposes of civil government for its officers to interfere when principles break out into overt acts against peace and good order." In these two sentences is found the true distinction between what properly belongs to the church and what to the State.

In a little more than a year after the passage of this statute the convention met which prepared the Constitution of the United States. Of this convention Mr. Jefferson was not a member, he being then absent as minister to France. As soon as he saw the draft of the Constitution proposed for adoption, he, in a letter to a friend, expressed his disappointment at the absence of an express declaration insuring the freedom of religion, but was willing to accept it as it was, trusting that the good sense and honest intentions of the people would bring about the necessary alterations. Five of the States, while adopting the Constitution, proposed amendments. Three—New Hampshire, New York, and Virginia—included in one form or another a declaration of religious freedom in the changes they desired to have made, as did also North Carolina, where the convention at first declined to ratify the Constitution until the proposed amendments were acted upon. Accordingly, at the first session of the First Congress the amendment now under consideration was proposed with others by Mr. Madison. It met the views of the advocates of religious freedom, and was adopted. Mr. Jefferson afterwards, in reply to an address to him by a committee of the Danbury Baptist Association, took occasion to say: "Believing with you that religion is a matter

which lies solely between man and his God; that he owes account to none other for his faith or his worship; that the legislative powers of the government reach actions only, and not opinions,—I contemplate with sovereign reverence that act of the whole American people which declared that their legislature should 'make no law respecting an establishment of religion or prohibiting the free exercise thereof,' thus building a wall of separation between church and State. Adhering to this expression of the supreme will of the nation in behalf of the rights of conscience, I shall see with sincere satisfaction the progress of those sentiments which tend to restore man to all his natural rights, convinced he has no natural right in opposition to his social duties." Coming as this does from an acknowledged leader of the advocates of the measure, it may be accepted almost as an authoritative declaration of the scope and effect of the amendment thus secured. Congress was deprived of all legislative power over mere opinion, but was left free to reach actions which were in violation of social duties or subversive of good order.

Polygamy has always been odious among the northern and western nations of Europe, and, until the establishment of the Mormon Church, was almost exclusively a feature of the life of Asiatic and of African people. At common law, the second marriage was always void, and from the earliest history of England polygamy has been treated as an offence against society.... We think it may safely be said there never has been a time in any State of the Union when polygamy has not been an offence against society, cognizable by the civil courts and punishable with more or less severity. In the face of all this evidence, it is impossible to believe that the constitutional guaranty of religious freedom was intended to prohibit legislation in respect to this most important feature of social life. Marriage, while from its very nature a sacred obligation, is nevertheless, in most civilized nations, a civil contract, and usually regulated by law. Upon it society may be said to be built, and out of its fruits spring social relations and social obligations and duties, with which government is necesarily required to deal. In fact, according as monogamous or polygamous marriages are allowed, do we find the principles on which the government of the people, to a greater or less extent, rests....

In our opinion, the statute immediately under consideration is within the legislative power of Congress. It is constitutional and valid as prescribing a rule of action for all those residing in the Territories, and in places over which the United States have exclusive control. This being so, the only question which remains is, whether those who make polygamy a part of their religion are excepted from the operation of the statute. If they are, then those who do not make polygamy a part of their religious belief may be found guilty and punished, while those who do, must be acquitted and go free. This would be introducing a new element into criminal law. Laws are made for the government of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices. Suppose one believed that human sacrifices were a necessary part of religious worship, would it be seriously contended that the civil government under which he lived could not interfere to prevent a sacrifice? Or if a wife religiously believed it was her duty to burn herself upon the funeral pile of her dead husband, would it be beyond the power of the civil government to prevent her carrying her belief into practice?

So here, as a law of the organization of society under the exclusive dominion of the United States, it is provided that plural marriages shall not be allowed. Can a man excuse his practices to the contrary because of his religious belief? To permit this would be to make the professed doctrines of religious belief superior to the law of the land, and in effect to permit every citizen to become a law unto himself. Government could exist only in name under such circumstances....

Reading 38: From *Braunfeld v. Brown*, 366 U.S. 599 (1961)

Mr. Chief Justice Warren announced the judgment of the Court and an opinion in which Mr. Justice Black, Mr. Justice Clark and Mr. Justice Whittaker concur....

Appellants are merchants in Philadelphia who engage in the retail sale of clothing and home furnishings within the proscription of the statute in issue. Each of the appellants is a member of the Orthodox Jewish faith, which requires the closing of their places of business and a total abstention from all manner of work from nightfall each Friday until nightfall each Saturday. They instituted a suit in the court below seeking a permanent injunction against the enforcement of the 1959 statute. Their complaint, as amended, alleged that appellants had previously kept their places of business open on Sunday; that each of appellants had done a substantial amount of business on Sunday, compensating somewhat for their closing on Saturday; that Sunday closing will result in impairing the ability of all appellants to earn a livelihood and will render appellant Braunfeld unable to continue in his business, thereby losing his capital investment; that the statute is unconstitutional for the reasons stated above....

Appellants contend that the enforcement against them of the Pennsylvania statute will prohibit the free exercise of

their religion because, due to the statute's compulsion to close on Sunday, appellants will suffer substantial economic loss, to the benefit of their non-Sabbatarian competitors, if appellants also continue their Sabbath observance by closing their businesses on Saturday; that this result will either compel appellants to give up their Sabbath observance, a basic tenet of the Orthodox Jewish faith, or will put appellants at a serious economic disadvantage if they continue to adhere to their Sabbath. Appellants also assert that the statute will operate so as to hinder the Orthodox Jewish faith in gaining new adherents. And the corollary to these arguments is that if the free exercise of appellants' religion is impeded, that religion is being subjected to discriminatory treatment by the State....

Concededly, appellants and all other persons who wish to work on Sunday will be burdened economically by the State's day of rest mandate; and appellants point out that their religion requires them to refrain from work on Saturday as well. Our inquiry then is whether, in these circumstances, the First and Fourteenth Amendments forbid application of the Sunday Closing Law to appellants.

Certain aspects of religious exercise cannot, in any way, be restricted or burdened by either federal or state legislation. Compulsion by law of the acceptance of any creed or the practice of any form of worship is strictly forbidden. The freedom to hold religious beliefs and opinions is absolute....

However, the freedom to act, even when the action is in accord with one's religious convictions, is not totally free from legislative restrictions.... Legislative power over mere opinion is forbidden but it may reach people's actions when they are found to be in violation of important social duties or subversive of good order, even when the actions are demanded by one's religion....

To strike down, without the most critical scrutiny, legislation which imposes only an indirect burden on the exercise of religion, i.e., legislation which does not make unlawful the religious practice itself, would radically restrict the operating latitude of the legislature. Statutes which tax income and limit the amount which may be deducted for religious contributions impose an indirect economic burden on the observance of the religion of the citizen whose religion requires him to donate a greater amount to his church; statutes which require the courts to be closed on Saturday and Sunday impose a similar indirect burden on the observance of the religion of the trial lawyer whose religion requires him to rest on a weekday. The list of legislation of this nature is nearly limitless.

Needless to say, when entering the area of religious freedom, we must be fully cognizant of the particular protection that the Constitution has accorded it. Abhorrence of religious persecution and intolerance is a basic part of our heritage. But we are a cosmopolitan nation made up of people of almost every conceivable religious preference.... Consequently, it cannot be expected, much less required, that legislators enact no law regulating conduct that may in some way result in an economic disadvantage to some religious sects and not to others because of the special practices of the various religions. We do not believe that such an effect is an absolute test for determining whether the legislation violates the freedom of religion protected by the First Amendment....

Reading 39: From *Sherbert v. Verner*, 374 U.S. 398 (1963)

Mr. Justice Brennan delivered the opinion of the Court. Appellant, a member of the Seventh-day Adventist Church, was discharged by her South Carolina employer because she would not work on Saturday, the Sabbath Day of her faith. When she was unable to obtain other employment because from conscientious scruples she would not take Saturday work, she filed a claim for unemployment compensation benefits under the South Carolina Unemployment Compensation Act....

Plainly enough, appellant's conscientious objection to Saturday work constitutes no conduct prompted by religious principles of a kind within the reach of state legislation. If, therefore, the decision of the South Carolina Supreme Court is to withstand appellant's constitutional challenge, it must be either because her disqualification as a beneficiary represents no infringement by the State of her constitutional rights of free exercise, or because any incidental burden on the free exercise of appellant's religion may be justified by a "compelling state interest in the regulation of a subject within the State's constitutional power to regulate...."

We turn first to the question whether the disqualification for benefits imposes any burden on the free exercise of appellant's religion. We think it is clear that it does. In a sense the consequences of such a disqualification to religious principles and practices may be only an indirect result of welfare legislation within the State's general competence to enact; it is true that no criminal sanctions directly compel appellant to work a six-day week. But this is only the beginning, not the end of our inquiry. For "[i]f the purpose or effect of a law is to impede the observance of one or all religions or is to discriminate invidiously between religions, that law is constitutionally invalid even though the burden may be characterized as being only indirect." Here not only is it apparent that appellant's declared ineligibility for benefits derives solely from the

practice of her religion, but the pressure upon her to forgo that practice is unmistakable. The ruling forces her to choose between following the precepts of her religion and forfeiting benefits, on the one hand, and abandoning one of the precepts of her religion in order to accept work, on the other hand. Governmental imposition of such a choice puts the same kind of burden upon the free exercise of religion as would a fine imposed against appellant for her Saturday worship.

Nor may the South Carolina court's construction of the statute be saved from constitutional infirmity on the ground that unemployment compensation benefits are not appellant's "right" but merely a "privilege." It is too late in the day to doubt that the liberties of religion and expression may be infringed by the denial of or placing of conditions upon a benefit or privilege....

We must next consider whether some compelling state interest enforced in the eligibility provisions of the South Carolina statute justifies the substantial infringement of appellant's First Amendment right....

... The state interest asserted in the present case is wholly dissimilar to the interests which were found to justify the less direct burden upon religious practices in *Braunfeld v. Brown*. The Court recognized that the Sunday closing law which that decision sustained undoubtedly served "to make the practice of [the Orthodox Jewish merchants'] ... religious beliefs more expensive." But the statute was nevertheless saved by a countervailing factor which finds no equivalent in the instant case—a strong state interest in providing one uniform day of rest for all workers. That secular objective could be achieved, the Court found, only by declaring Sunday to be that day of rest. Requiring exemptions for Sabbatarians, while theoretically possible, appeared to present an administrative problem of such magnitude, or to afford the exempted class so great a competitive advantage, that such a requirement would have rendered the entire statutory scheme unworkable. In the present case no such justifications underlie the determination of the state court that appellant's religion makes her ineligible to receive benefits....

Mr. Justice Harlan, whom Mr. Justice White joins, dissenting.

Today's decision is disturbing both in its rejection of existing precedent and in its implications for the future. The significance of the decision can best be understood after an examination of the state law applied in this case.

South Carolina's Unemployment Compensation Law was enacted in 1936 in response to the grave social and economic problems that arose during the depression of that period....

The South Carolina Supreme Court has uniformly applied this law in conformity with its clearly expressed purpose. It has consistently held that one is not "available for work" if his unemployment has resulted not from the inability of industry to provide a job but rather from personal circumstances, no matter how compelling....

With this background, this Court's decision comes into clearer focus. What the Court is holding is that if the State chooses to condition unemployment compensation on the applicant's availability for work, it is constitutionally compelled to carve out an exception—and to provide benefits—for those whose unavailability is due to their religious convictions. Such a holding has particular significance in two respects.

First, despite the Court's protestations to the contrary, the decision necessarily overrules *Braunfeld v. Brown*....

Second, the implications of the present decision are far more troublesome than its apparently narrow dimensions would indicate at first glance. The meaning of today's holding, as already noted, is that the State must furnish unemployment benefits to one who is unavailable for work if the unavailability stems from the exercise of religious convictions. The State, in other words, must *single out* for financial assistance those whose behavior is religiously motivated, even though it denies such assistance to others whose identical behavior (in this case, inability to work on Saturdays) is not religiously motivated.

It has been suggested that such singling out of religious conduct for special treatment may violate the constitutional limitations on state action....

But there is, I believe, enough flexibility in the Constitution to permit a legislative judgment accommodating an unemployment compensation law to the exercise of religious beliefs such as appellant's.

For very much the same reasons, however, I cannot subscribe to the conclusion that the State is constitutionally *compelled* to carve out an exception to its general rule of eligibility in the present case. Those situations in which the Constitution may require special treatment on account of religion are, in my view, few and far between, and this view is amply supported by the course of constitutional litigation in this area....

Such compulsion in the present case is particularly inappropriate in light of the indirect, remote, and insubstantial effect of the decision below on the exercise of appellant's religion and in light of the direct financial assistance to religion that today's decision requires....

Reading 40: From *Welsh v. United States*, 398 U.S. 333 (1970)

Mr. Justice Black announced the judgment of the Court and delivered an opinion in which Mr. Justice Douglas, Mr. Justice Brennan, and Mr. Justice Marshall join.

The petitioner, Elliott Ashton Welsh II, was convicted by a United States District Judge of refusing to submit to induction into the Armed Forces . . . and was on June 1, 1966, sentenced to imprisonment for three years. One of petitioner's defenses to the prosecution was that of the Universal Military Training and Service Act exempted him from combat and noncombat service because he was "by reason of religious training and belief . . . conscientiously opposed to participation in war in any form." After finding that there was no religious basis for petitioner's conscientious objector claim, the Court of Appeals . . . affirmed the conviction. We granted certiorari chiefly to review the contention that Welsh's conviction should be set aside on the basis of this Court's decision in *United States v. Seeger*. For the reasons to be stated, and without passing upon the constitutional arguments that have been raised, we vote to reverse this conviction because of its fundamental inconsistency with *United States v. Seeger*.

The controlling facts in this case are strikingly similar to those in *Seeger*. Both Seeger and Welsh were brought up in religious homes and attended church in their childhood, but in neither case was this church one which taught its members not to engage in war at any time for any reason. Neither Seeger nor Welsh continued his childhood religious ties into his young manhood, and neither belonged to any religious group or adhered to the teachings of any organized religion during the period of his involvement with the Selective Service System. At the time of registration for the draft, neither had yet come to accept pacifist principles. Their views on war developed only in subsequent years, but when their ideas did fully mature both made application to their local draft boards for conscientious objector exemptions from military service under 6 (j) of the Universal Military Training and Service Act. That section then provided, in part:

> "Nothing contained in this title shall be construed to require any person to be subject to combatant training and service in the armed forces of the United States who, by reason of religious training and belief, is conscientiously opposed to participation in war in any form. Religious training and belief in this connection means an individual's belief in a relation to a Supreme Being involving duties superior to those arising from any human relation, but does not include essentially political, sociological, or philosophical views or a merely personal moral code."

In filling out their exemption applications both Seeger and Welsh were unable to sign the statement that, as printed in the Selective Service form, stated "I am, by reason of my religious training and belief, conscientiously opposed to participation in war in any form." Seeger could sign only after striking the words "training and" and putting quotation marks around the word "religious." Welsh could sign only after striking the words "my religious training and." On those same applications [illegible] er could definitely affirm or deny that he believed in a "Supreme Being," both stating that they preferred not to have their religious views open. But both Seeger and Welsh attached to their applications that they held deep conscientious objections against taking part in wars where people were killed. Both believed that killing in war was wrong, unethical, and immoral, and their consciences forbade them to take part in such an evil practice. Their objection to participating in war in any form could not be said to come from a "still, small voice of conscience"; rather, for them that voice was so loud and insistent that both men preferred to go to jail rather than serve in the Armed Forces. There was never any question about the sincerity and depth of Seeger's convictions as a conscientious objector, and the same is true of Welsh. . . . Both Seeger and Welsh subsequently refused to submit to induction into the military and both were convicted of that offense.

In *Seeger* the Court was confronted, first, with the problem that 6 (j) defined "religious training and belief" in terms of a "belief in a relation to a Supreme Being . . .," a definition that arguably gave a preference to those who believed in a conventional God as opposed to those who did not. Noting the "vast panoply of beliefs" prevalent in our country, the Court construed the congressional intent as being in "keeping with its long-established policy of not picking and choosing among religious beliefs," and accordingly interpreted "the meaning of religious training and belief so as to embrace *all* religions. . . ." But, having decided that all religious conscientious objectors were entitled to the exemption, we faced the more serious problem of determining which beliefs were "religious" within the meaning of the statute. This question was particularly difficult in the case of Seeger himself. Seeger stated that his was a "belief in and devotion to goodness and virtue for their own sakes, and a religious faith in a purely ethical creed." . . . The Court's principal statement of its test for determining whether a conscientious objector's beliefs are religious within the meaning of 6 (j) was as follows:

"The test might be stated in these words: A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition."

The Court made it clear that these sincere and meaningful beliefs that prompt the registrant's objection to all wars need not be confined in either source or content to traditional or parochial concepts of religion. It held that 6 (j) "does not distinguish between externally and internally derived beliefs," and also held that "intensely personal" convictions which some might find "incomprehensible" or "incorrect" come within the meaning of "religious belief" in the Act. What is necessary under *Seeger* for a registrant's conscientious objection to all war to be "religious" within the meaning of 6 (j) is that this opposition to war stem from the registrant's moral, ethical, or religious beliefs about what is right and wrong and that these beliefs be held with the strength of traditional religious convictions. Most of the great religions of today and of the past have embodied the idea of a Supreme Being or a Supreme Reality—a God—who communicates to man in some way a consciousness of what is right and should be done, of what is wrong and therefore should be shunned. If an individual deeply and sincerely holds beliefs that are purely ethical or moral in source and content but that nevertheless impose upon him a duty of conscience to refrain from participating in any war at any time, those beliefs certainly occupy in the life of that individual "a place parallel to that filled by . . . God" in traditionally religious persons. Because his beliefs function as a religion in his life, such an individual is as much entitled to a "religious" conscientious objector exemption under 6 (j) as is someone who derives his conscientious opposition to war from traditional religious convictions. . . .

In the case before us the Government seeks to distinguish our holding in *Seeger* on basically two grounds, both of which were relied upon by the Court of Appeals in affirming Welsh's conviction. First, it is stressed that Welsh was far more insistent and explicit than Seeger in denying that his views were religious. . . . We certainly do not think that 6 (j)'s exclusion of those persons with "essentially political, sociological, or philosophical views or a merely personal moral code" should be read to exclude those who hold strong beliefs about our domestic and foreign affairs or even those whose conscientious objection to participation in all wars is founded to a substantial extent upon considerations of public policy. The two groups of registrants that obviously do fall within these exclusions from the exemption are those whose beliefs are not deeply held and those whose objection to war does not rest at all upon moral, ethical, or religious principle but instead rests solely upon considerations of policy, pragmatism, or expediency. . . .

Welsh stated that he "believe[d] the taking of life—anyone's life—to be morally wrong." . . . Welsh elaborated his beliefs in later communications with Selective Service officials. On the basis of these beliefs and the conclusion of the Court of Appeals that he held them "with the strength of more traditional religious convictions," we think Welsh was clearly entitled to a conscientious objector exemption. Section 6 (j) requires no more. That section exempts from military service all those whose consciences, spurred by deeply held moral, ethical, or religious beliefs, would give them no rest or peace if they allowed themselves to become a part of an instrument of war. . . .

Mr. Justice Harlan, concurring in the result. . . .

In my opinion, the liberties taken with the statute both in *Seeger* and today's decision cannot be justified in the name of the familiar doctrine of construing federal statutes in a manner that will avoid possible constitutional infirmities in them. There are limits to the permissible application of that doctrine, and, as I will undertake to show in this opinion, those limits were crossed in *Seeger*, and even more apparently have been exceeded in the present case. I therefore find myself unable to escape facing the constitutional issue that this case squarely presents: whether 6 (j) in limiting this draft exemption to those opposed to war in general because of theistic beliefs runs afoul of the religious clauses of the First Amendment. . . .

The natural reading of 6 (j), which quite evidently draws a distinction between theistic and nontheistic religions, is the only one that is consistent with the legislative history. . . .

Unless we are to assume an Alice-in-Wonderland world where words have no meaning, I think it fair to say that Congress' choice of language cannot fail to convey to the discerning reader the very policy choice that the prevailing opinion today completely obliterates: that between conventional religions that usually have an organized and formal structure and dogma and a cohesive group identity, even when nontheistic, and cults that represent schools of thought and in the usual case are without formal structure or are, at most, loose and informal associations of individuals who share common ethical, moral, or intellectual views. . . .

If an important congressional policy is to be perpetuated by recasting unconstitutional legislation, as the prevailing opinion has done here, the analytically sound approach is to accept responsibility for this decision. Its justification cannot be by resort to legislative intent, as that term is usually employed, but by a different kind of legislative intent, namely the presumed grant of power to the courts to decide whether it more nearly accords with Congress' wishes to eliminate its policy altogether or extend it in order to render what Congress plainly did intend, constitutional. . . .

The constitutional question that must be faced in this case is whether a statute that defers to the individual's con-

science only when his views emanate from adherence to theistic religious beliefs is within the power of Congress. Congress, of course, could, entirely consistently with the requirements of the Constitution, eliminate *all* exemptions for conscientious objectors. Such a course would be wholly "neutral" and, in my view, would not offend the Free Exercise Clause.... However, having chosen to exempt, it cannot draw the line between theistic or nontheistic religious beliefs on the one hand and secular beliefs on the other. Any such distinctions are not, in my view, compatible with the Establishment Clause of the First Amendment.... [T]he statute ... not only accords a preference to the "religious" but also disadvantages adherents of religions that do not worship a Supreme Being. The constitutional infirmity cannot be cured, moreover, even by an impermissible construction that eliminates the theistic requirement and simply draws the line between religious and nonreligious. This in my view offends the Establishment Clause and is that kind of classification that this Court has condemned....

If the exemption is to be given application, it must encompass the class of individuals it purports to exclude, those whose beliefs emanate from a purely moral, ethical, or philosophical source. The common denominator must be the intensity of moral conviction with which a belief is held....

When a policy has roots so deeply embedded in history, there is a compelling reason for a court to hazard the necessary statutory repairs if they can be made within the administrative framework of the statute and without impairing other legislative goals, even though they entail, not simply eliminating an offending section, but rather building upon it. Thus I am prepared to accept the prevailing opinion's conscientious objector test, not as a reflection of congressional statutory intent but as patchwork of ju ·ial making that cures the defect of underinclusion in 6 (j) and can be administered by local boards in the usual course of business....

Mr. Justice White, with whom The Chief Justice and Mr. Justice Stewart join, dissenting....

I cannot join today's construction of 6 (j) extending draft exemption to those who disclaim religious objections to war and whose views about war represent a purely personal code arising not from religious training and belief as the statute requires but from readings in philosophy, history, and sociology.... Even if Welsh is quite right in asserting that exempting religious believers is an establishment of religion forbidden by the First Amendment, he nevertheless remains one of those persons whom Congress took pains not to relieve from military duty. Whether or not 6 (j) is constitutional, Welsh had no First Amendment excuse for refusing to report for induction....

If I am wrong in thinking that Welsh cannot benefit from invalidation of 6 (j) on Establishment Clause grounds, I would nevertheless affirm his conviction; for I cannot hold that Congress violated the Clause in exempting from the draft all those who oppose war by reason of religious training and belief. In exempting religious conscientious objectors, Congress was making one of two judgments, perhaps both. First, 6 (j) may represent a purely practical judgment that religious objectors, however admirable, would be of no more use in combat than many others unqualified for military service. Exemption was not extended to them to further religious belief or practice but to limit military service to those who were prepared to undertake the fighting that the armed services have to do. On this basis, the exemption has neither the primary purpose nor the effect of furthering religion....

Second, Congress may have granted the exemption because otherwise religious objectors would be forced into conduct that their religions forbid and because in the view of Congress o deny the exemption would violate the Free Exercise Clause or at least raise grave problems in this respect. True, this Court has more than once stated its unwillingness to construe the First Amendment, standing alone, as requiring draft exemptions for religious believers....

However this Court might construe the First Amendment, Congress has regularly steered clear of free exercise problems by granting exemptions to those who conscientiously oppose war on religious grounds....

The Establishment Clause as construed by this Court unquestionably has independent significance; its function is not wholly auxiliary to the Free Exercise Clause. It bans some involvements of the State with religion that otherwise might be consistent with the Free Exercise Clause. But when in the rationally based judgment of Congress free exercise of religion calls for shielding religious objectors from compulsory combat duty, I am reluctant to frustrate the legislative will by striking down the statutory exemption because it does not also reach those to whom the Free Exercise Clause offers no protection whatsoever.

Reading 41: From *Wisconsin v. Yoder*, 406 U.S. 205 (1972)

Mr. Chief Justice Burger delivered the opinion of the Court.

On petition of the State of Wisconsin, we granted the writ in this case to review a decision of the Wisconsin Supreme

Court holding that respondents' convictions for violating the State's compulsory school attendance law were invalid under the Free Exercise Clause of the First Amendment to the United States Constitution made applicable to the State by the Fourteenth Amendment. For the reasons hereafter stated we affirm the judgment of the Supreme Court of Wisconsin.

Respondents Jonas Yoder and Adin Yutzy are members of the Old Order Amish Religion, and respondent Wallace Miller is a member of the Conservative Amish Mennonite Church. They and their families are residents of Green County, Wisconsin. Wisconsin's compulsory school attendance law required them to cause their children to attend public or private school until reaching age 16 but the respondents declined to send their children, ages 14 and 15, to public school after completing the eighth grade. The children were not enrolled in any private school, or within any recognized exception to the compulsory attendance law, and they are conceded to be subject to the Wisconsin statute.

On complaint of the school district administrator for the public schools, respondents were charged, tried, and convicted of violating the compulsory attendance law in Green County Court and were fined the sum of $5 each. Respondents defended on the ground that the application of the compulsory attendance law violated their rights under the First and Fourteenth Amendments....

Amish objection to formal education beyond the eighth grade is firmly grounded in ... central religious concepts. They object to the high school and higher education generally because the values it teaches are in marked variance with Amish values and the Amish way of life; they view secondary school education as an impermissible exposure of their children to a "worldly" influence in conflict with their beliefs. The high school tends to emphasize intellectual and scientific accomplishments, self-distinction, competitiveness, worldly success, and social life with other students. Amish society emphasizes informal learning-through-doing, a life of "goodness," rather than a life of intellect, wisdom, rather than technical knowledge, community welfare rather than competition, and separation, rather than integration with contemporary worldly society.

Formal high school education beyond the eighth grade is contrary to Amish beliefs not only because it places Amish children in an environment hostile to Amish beliefs with increasing emphasis on competition in class work and sports and with pressure to conform to the styles, manners and ways of the peer group, but because it takes them away from their community, physically and emotionally, during the crucial and formative adolescent period of life....

The Amish do not object to elementary education through the first eight grades as a general proposition because they agree that their children must have basic skills in the "three R's" in order to read the Bible, to be good farmers and citizens and to be able to deal with non-Amish people when necessary in the course of daily affairs. They view such a basic education as acceptable because it does not significantly expose their children to worldly values or interfere with their development in the Amish community during the crucial adolescent period....

There is no doubt as to the power of a State, having a high responsibility for education of its citizens, to impose reasonable regulations for the control and duration of basic education....

... [A] State's interest in universal education, however highly we rank it, is not totally free from a balancing process when it impinges on other fundamental rights and interests, such as those specifically protected by the Free Exercise Clause of the First Amendment and the traditional interest of parents with respect to the religious upbringing of their children so long as they, in the words of *Pierce*, "prepare [them] for additional obligations." ...

The essence of all that has been said and written on the subject is that only those interests of the highest order and those not otherwise served can overbalance legitimate claims to the free exercise of religion. We can accept it as settled, therefore, that however strong the State's interest in universal compulsory education, it is by no means absolute to the exclusion or subordination of all other interests....

We come then to the quality of the claims of the respondents concerning the alleged encroachment of Wisconsin's compulsory school attendance statute on their rights and the rights of their children to the free exercise of the religious beliefs they and their forbears have adhered to for almost three centuries. In evaluating those claims we must be careful to determine whether the Amish religious faith and their mode of life are, as they claim, inseparable and interdependent. A way of life, however virtuous and admirable, may not be interposed as a barrier to reasonable state regulation of education if it is based on purely secular considerations; to have the protection of the Religion Clauses, the claims must be rooted in religious belief. Although a determination of what is a "religious" belief or practice entitled to constitutional protection may present a most delicate question, the very concept of ordered liberty precludes allowing every person to make his own standards on matters of conduct in which society as a whole has important interests. Thus, if the Amish asserted their claims because of their subjective evaluation and rejection of the contemporary secular values accepted by the majority much as Thoreau rejected the social values of his time and isolated himself at Walden Pond, their claim would not rest on a religious basis. Thoreau's choice was philosophical and personal rather than religious, and such belief does not rise to the demands of the Religion Clause.

Giving no weight to such secular considerations, however, we see that the record in this case abundantly supports the claim that the traditional way of life of the Amish is not merely a matter of personal preference, but one of deep religious conviction, shared by an organized group, and intimately related to daily living....

In sum, the unchallenged testimony of acknowledged experts in education and religious history, almost 300 years of consistent practice, and strong evidence of a sustained faith pervading and regulating respondents' entire mode of life support the claim that enforcement of the State's requirement of compulsory formal education after the eighth grade would gravely endanger if not destroy the free exercise of respondents' religious beliefs....

It is true that activities of individuals, even when religiously based, are often subject to regulation by the States in the exercise of their undoubted power to promote the health, safety, and general welfare, or the Federal Government in the exercise of its delegated powers....

But to agree that religiously grounded conduct must often be subject to the broad police power of the State is not to deny that there are areas of conduct protected by the Free Exercise Clause of the First Amendment and thus beyond the power of the State to control, even under regulations of general applicability....

The requirement for compulsory education beyond the eighth grade is a relatively recent development in our history. Less than 60 years ago, the educational requirements of almost all of the States were satisfied by completion of the elementary grades, at least where the child was regularly and lawfully employed....

The independence and successful social functioning of the Amish community for a period approaching almost three centuries and more than 200 years in this country is strong evidence that there is at best a speculative gain, in terms of meeting the duties of citizenship, from an additional one or two years of compulsory formal education. Against this background it would require a more particularized showing from the State on this point to justify the severe interference with religious freedom such additional compulsory attendance would entail....

Our holding in no way determines the proper resolution of possible competing interests of parents, children, and the State in an appropriate state court proceeding in which the power of the State is asserted on the theory that Amish parents are preventing their minor children from attending high school despite their expressed desires to the contrary. Recognition of the claim of the State in such a proceeding would, of course, call into question traditional concepts of parental control over the religious upbringing and education of their minor children recognized in this Court's past decisions. It is clear that such an intrusion by a State into family decisions in the area of religious training would give rise to grave questions of religious freedom comparable to those raised here.... On this record we neither reach nor decide those issues....

For the reasons stated we hold, with the Supreme Court of Wisconsin, that the First and Fourteenth Amendments prevent the State from compelling respondents to cause their children to attend formal high school to age 16....

Mr. Justice Douglas, dissenting in part.

I agree with the Court that the religious scruples of the Amish are opposed to the education of their children beyond the grade schools, yet I disagree with the Court's conclusion that the matter is within the dispensation of parents alone. The Court's analysis assumes that the only interests at stake in the case are those of the Amish parents on the one hand, and those of the State on the other. The difficulty with this approach is that, despite the Court's claim, the parents are seeking to vindicate not only their own free exercise claims, but also those of their high-school-age children....

This issue has never been squarely presented before today. Our opinions are full of talk about the power of the parents over the child's education....

And we have in the past analyzed similar conflicts between parent and State with little regard for the views of the child....

Recent cases, however, have clearly held that the children themselves have constitutionally protectible interests....

These children are "persons" within the meaning of the Bill of Rights. We have so held over and over again....

On this important and vital matter of education, I think the children should be entitled to be heard. While the parents, absent dissent, normally speak for the entire family, the education of the child is a matter on which the child will often have decided views. He may want to be a pianist or an astronaut or an ocean geographer. To do so he will have to break from the Amish tradition.

It is the future of the student, not the future of the parents, that is imperilled in today's decision. If a parent keeps his child out of school beyond the grade school, then the child will be forever barred from entry into the new and amazing world of diversity that we have today....

Action, which the Court deemed to be antisocial, could be punished even though it was grounded on deeply held and sincere religious convictions. What we do today, at least in this respect, opens the way to give organized religion a broader base than it has ever enjoyed; and it even promises that in time *Reynolds* will be overruled.

In another way, however, the Court retreats when in reference to Henry Thoreau it says his "choice was philosophical and personal rather than religious, and such belief does not

rise to the demands of the Religion Clause." That is contrary to what we held in *United States v. Seeger*, where we were concerned with the meaning of the words "religious training and belief" in the Selective Service Act, which were the basis of many conscientious objector claims. We said: "... A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption comes within the statutory definition. This construction avoids imputing to Congress an intent to classify different religious beliefs, exempting some and excluding others, and is in accord with the well-established congressional policy of equal treatment for those whose opposition to service is grounded in their religious tenets." ...

I adhere to these exalted views of "religion" and see no acceptable alternative to them now that we have become a Nation of many religions and sects, representing all of the diversities of the human race....

Reading 42: From *Thomas v. Review Board*, 450 U.S. 707 (1981)

Chief Justice Burger delivered the opinion of the Court.

We granted certiorari to consider whether the State's denial of unemployment compensation benefits to the petitioner, a Jehovah's Witness who terminated his job because his religious beliefs forbade participation in the production of armaments, constituted a violation of his First Amendment right to free exercise of religion....

When asked at the hearing to explain what kind of work his religious convictions would permit, Thomas said that he would have no difficulty doing the type of work that he had done at the roll foundry. He testified that he could, in good conscience, engage indirectly in the production of materials that might be used ultimately to fabricate arms—for example, as an employee of a raw material supplier or of a roll foundry....

The Indiana court concluded that denying Thomas benefits would create only an indirect burden on his free exercise right and that the burden was justified by the legitimate state interest in preserving the integrity of the insurance fund and maintaining a stable work force by encouraging workers not to leave their jobs for personal reasons.

Finally, the court held that awarding unemployment compensation benefits to a person who terminates employment voluntarily for religious reasons, while denying such benefits to persons who terminate for other personal but nonreligious reasons, would violate the Establishment Clause of the First Amendment....

Where the state conditions receipt of an important benefit upon conduct proscribed by a religious faith, or where it denies such a benefit because of conduct mandated by religious belief, thereby putting substantial pressure on an adherent to modify his behavior and to violate his beliefs, a burden upon religion exists. While the compulsion may be indirect, the infringement upon free exercise is nonetheless substantial....

There is no evidence in the record to indicate that the number of people who find themselves in the predicament of choosing between benefits and religious beliefs is large enough to create "widespread unemployment," or even to seriously affect unemployment—and no such claim was advanced by the Review Board. Similarly, although detailed inquiry by employers into applicants' religious beliefs is undesirable, there is no evidence in the record to indicate that such inquiries will occur in Indiana, or that they have occurred in any of the states that extend benefits to people in the petitioner's position. Nor is there any reason to believe that the number of people terminating employment for religious reasons will be so great as to motivate employers to make such inquiries.

Neither of the interests advanced is sufficiently compelling to justify the burden upon Thomas' religious liberty. Accordingly, Thomas is entitled to receive benefits unless, as the respondents contend and the Indiana court held, such payment would violate the Establishment Clause....

Justice Rehnquist, dissenting.

The Court today holds that the State of Indiana is constitutionally required to provide direct financial assistance to a person solely on the basis of his religious beliefs. Because I believe that the decision today adds mud to the already muddied waters of First Amendment jurisprudence, I dissent.

The Court correctly acknowledges that there is a "tension" between the Free Exercise and Establishment Clauses of the First Amendment of the United States Constitution. Although the relationship of the two Clauses has been the subject of much commentary, the "tension" is a fairly recent vintage, unknown at the time of the framing and adoption of the First Amendment. The causes of the tension, it seems to me, are threefold. First, the growth of social welfare legislation during the latter part of the 20th century has greatly magnified the potential for conflict between the two Clauses, since such legislation touches the individual at so many points in his life. Second, the decision by this Court that the First Amendment was "incorporated" into the Fourteenth Amendment and thereby made applicable against the States similarly multiplied the number of instances in which

the "tension" might arise. The third, and perhaps most important, cause of the tension is our overly expansive interpretation of *both* Clauses. By broadly construing both Clauses, the Court has constantly narrowed the channel between the Scylla and Charybdis through which any state or federal action must pass in order to survive constitutional scrutiny....

The decision today illustrates how far astray the Court has gone in interpreting the Free Exercise and Establishment Clauses of the First Amendment. Although the Court holds that a State is constitutionally required to provide direct financial assistance to persons solely on the basis of their religious beliefs and recognizes the "tension" between the two Clauses, it does little to help resolve that tension or to offer meaningful guidance to other courts which must decide cases like this on a day-by-day basis. Instead, it simply asserts that there is no Establishment Clause violation here and leaves the tension between the two Religion Clauses to be resolved on a case-by-case basis. As suggested above, however, I believe that the "tension" is largely of this Court's own making, and would diminish almost to the vanishing point if the Clauses were properly interpreted....

The Court's treatment of the Establishment Clause issue is equally unsatisfying. Although today's decision requires a State to provide direct financial assistance to persons solely on the basis of their religious beliefs, the Court nonetheless blandly assures us, just as it did in *Sherbert*, that its decision "plainly" does not foster the "establishment" of religion. I would agree that the Establishment Clause, properly interpreted, would not be violated if Indiana voluntarily chose to grant unemployment benefits to those persons who left their jobs for religious reasons. But I also believe that the decision below is inconsistent with many of our prior Establishment Clause cases. Those cases, if faithfully applied, would require us to hold that such voluntary action by a State *did* violate the Establishment Clause....

In sum, my difficulty with today's decision is that it reads the Free Exercise Clause too broadly and it fails to squarely acknowledge that such a reading conflicts with many of our Establishment Clause cases. As such, the decision simply exacerbates the "tension" between the two Clauses....

Although I heartily agree with the Court's tacit abandonment of much of our rhetoric about the Establishment Clause, I regret that the Court cannot see its way clear to restore what was surely intended to have been a greater degree of flexibility to the Federal and State Governments in legislating consistently with the Free Exercise Clause....

Reading 43: From *United States v. Lee*, 102 S. Ct. 1051 (1982)

Chief Justice Burger delivered the opinion of the Court.

We noted probable jurisdiction to determine whether imposition of social security taxes is unconstitutional as applied to persons who object on religious grounds to receipt of public insurance benefits and to payment of taxes to support public insurance funds. The District Court concluded that the Free Exercise Clause prohibits forced payment of social security taxes when payment of taxes and receipt of benefits violates the taxpayer's religion. We reverse.

Appellee, a member of the Old Order Amish, is a self-employed farmer and carpenter. From 1970 to 1977, appellee employed several other Amish to work on his farm and in his carpentry shop. He failed to file the quarterly social security tax returns required of employers, withhold social security tax from his employees or pay the employer's share of social security taxes.

In 1978, the Internal Revenue Service assessed appellee in excess of $27,000 for unpaid employment taxes; he paid $91—the amount owed for the first quarter of 1973—and then sued in the United States District Court for the Western District of Pennsylvania for a refund, claiming that imposition of the social security taxes violated his First Amendment Free Exercise rights and those of his Amish employees....

The preliminary inquiry in determining the existence of a constitutionally-required exemption is whether the payment of social security taxes and the receipt of benefits interferes with the Free Exercise rights of the Amish. The Amish believe that there is a religiously based obligation to provide for their fellow members the kind of assistance contemplated by the social security system....

We ... accept appellee's contention that both payment and receipt of social security benefits is forbidden by the Amish faith. Because the payment of the taxes or receipt of benefits violates Amish religious beliefs, compulsory participation in the social security system interferes with their Free Exercise rights.

The conclusion that there is a conflict between the Amish faith and the obligations imposed by the social security system is only the beginning, however, and not the end of the inquiry. Not all burdens on religion are unconstitutional....

Because the social security system is nationwide, the governmental interest is apparent. The social security system in the United States serves the public interest by providing a comprehensive insurance system with a variety of benefits available to all participants, with costs shared by employers and employees....

. . . Mandatory participation is indispensable to the fiscal vitality of the social security system. "[W]idespread individual voluntary coverage under social security . . . would undermine the soundness of the social security program." Moreover, a comprehensive national social security system providing for voluntary participation would be almost a contradiction in terms and difficult, if not impossible, to administer. Thus, the government's interest in assuring mandatory and continuous participation in and contribution to the social security system is very high. . . .

The remaining inquiry is whether accommodating the Amish belief will unduly interfere with fulfillment of the governmental interest. . . .

Congress and the Courts have been sensitive to the needs flowing from the Free Exercise Clause, but every person cannot be shielded from all the burdens incident to exercising every aspect of the right to practice religious beliefs. When followers of a particular sect enter into commercial activity as a matter of choice, the limits they accept on their own conduct as a matter of conscience and faith are not to be superimposed on the statutory schemes which are binding on others in that activity. Granting an exemption from social security taxes to an employer operates to impose the employer's religious faith on the employees. Congress drew a line exempting the self-employed Amish but not all persons working for an Amish employer. The tax imposed on employers to support the social security system must be uniformly applicable to all, except as Congress provides explicitly otherwise. . . .

Questions for Discussion

1. Polygamy was a religious tenet of the Mormon faith. Do you feel the Court was too hasty in rejecting the free exercise claim in *Reynolds*? Also, it was in this case that the Court began to look at the historical record to interpret the religion clauses, and the early exploration here was consistently drawn upon by the Justices in later cases. Do you think the Justices do their job well when they rely upon such precedent?

2. Why do you believe the Court was generally unsympathetic to the claim of Jewish merchants in the Sunday closing law case? Does the woman denied workmen's compensation make a different argument? Should distinctions be made upon the sympathy generated by the individuals involved, rather than on the arguments they make?

3. In *Welsh*, a statutory religious objection was widened to include sincere claims based on non-religious grounds. Do you support such action? Does such widening of an exemption belittle religious convictions or not?

4. Should a religious exemption from valid civil law be granted, as the Justices did in *Yoder*, on the Court's conclusion that the Amish religion and way of life have existed for hundreds of years and is no threat to the general social order? Are there dangers involved when an agency of government, such as the Supreme Cout, determines the quality or sincerity of religious belief?

5. Are contributions to the social security system by an employer clearly a more compelling social policy than protecting the objective standards for determining who is to receive workmen's compensation? If not, why did the Court decide the two cases differently?

Chapter Seven

School Prayer and Financial Assistance: What Tends to Establish Religion?

We have seen how the court, without much analysis or explanation, made the no establishment clause binding upon the states. Talk of a "wall of separation," a phrase used by Thomas Jefferson in responding to a sympathetic letter from the Danbury Baptist Association in 1802, between religion and government has not led the Justices to view the wall as an impenetrable one. In fact, we are hearing less about any wall these days and more about accommodation.

In the early school prayer cases, however, the wall stands as high as ever. In 1962 in *Engel v. Vitale*, the Court struck down a non-denominational prayer framed and prescribed by the state governing board for recitation in the New York public schools (Reading 44). The following year the Justices concluded that Bible reading in public schools was just as much a violation of the no-establishment clause of the First Amendment, made applicable to the states by means of the Fourteenth Amendment (Reading 45). Any hope that a more politically conservative Court would be willing to reinspect these decisions was dashed in 1984.

Although the wall remains a useful metaphor in the matter of officially-condoned school prayer, it is less serviceable in other establishment areas. In 1971 in *Lemon v. Kurtzman* and a companion case, the Court struck down programs in two states that sought to provide financial aid to non-public and church-related schools (Reading 46). In those cases the Justices framed a three-pronged test that they hoped would clarify the question of when governmental action violated the no-establishment clause. On the same decision day, however, the Justices condoned a federal program that made substantial construction money available to sectarian colleges and universities (Reading 47).

The most recent decision in the area shows a court less attracted to the test it proposed in *Lemon* and more willing to accommodate state attempts to aid, although indirectly, church-related schools (Reading 48).

In reading the cases in this section, you will find some lines that are clearly drawn, while others remain quite fuzzy. Does this situation bother you?

Reading 44: From *Engel v. Vitale*, 370 U.S. 421 (1962)

Mr. Justice Black delivered the opinion of the Court.

The respondent Board of Education of Union Free School District No. 9, New Hyde Park, New York, acting in its official capacity under state law, directed the School District's principal to cause the following prayer to be said aloud by each class in the presence of a teacher at the beginning of each school day:

"Almighty God, we acknowledge our dependence upon Thee, and we beg Thy blessings upon us, our parents, our teachers and our Country."

This daily procedure was adopted on the recommendation of the State Board of Regents, a governmental agency created by the State Constitution to which the New York Legislature has granted broad supervisory, executive, and legislative powers over the State's public school system. These state officials composed the prayer which they recommended and published as a part of their "Statement on Moral and Spiritual Training in the Schools," saying: "We believe that this Statement will be subscribed to by all men and women of good will, and we call upon all of them to aid in giving life to our program."

Shortly after the practice of reciting the Regent's prayer was adopted by the School District, the parents of ten pupils brought this action in a New York State Court insisting that use of this official prayer in the public schools was contrary to the beliefs, religions, or religious practices of both themselves and their children. Among other things, these parents challenged the constitutionality of both the state law authorizing the School District to direct the use of prayer in public schools and the School District's regulation ordering the recitation of

this particular prayer on the ground that these actions of official governmental agencies violate that part of the First Amendment of the Federal Constitution which commands that "Congress shall make no law respecting an establishment of religion"–a command which was "made applicable to the State of New York by the Fourteenth Amendment of the said Constitution."

We think that by using its public school system to encourage recitation of the Regents' prayer, the State of New York has adopted a practice wholly inconsistent with the Establishment Clause. There can, of course, be no doubt that New York's program of daily classroom invocation of God's blessings as prescribed in the Regents' prayer is a religious activity. It is a solemn avowal of divine faith and supplication for the blessings of the Almighty. The nature of such a prayer has always been religious, none of the respondents has denied this and the trial court expressly so found....

The petitioners contend among other things that the state laws requiring or permitting use of the Regents' prayer must be struck down as a violation of the Establishment Clause because that prayer was composed by governmental officials as a part of a governmental program to further religious beliefs. For this reason, petitioners argue, the State's use of the Regents' prayer in its public school system breaches the constitutional wall of separation between Church and State. We agree with that contention since we think that the constitutional prohibition against laws respecting an establishment of religion must at least mean that in this country it is no part of the business of government to compose official prayers for any group of the American people to recite as a part of a religious program carried on by government.

It is a matter of history that this very practice of establishing governmentally composed prayers for religious services was one of the reasons which caused many of our early colonists to leave England and seek religious freedom in America....

By the time of the adoption of the Constitution, our history shows that there was a widespread awareness among many Americans of the dangers of a union of Church and State. These people knew, some of them from bitter personal experience, that one of the greatest dangers to the freedom of the individual to worship in his own way lay in the Government's placing its official stamp of approval upon one particular kind of prayer or one particular form of religious services. They knew the anguish, hardship and bitter strife that could come when zealous religious groups struggled with one another to obtain the Government's stamp of approval from each King, Queen, or Protector that came to temporary power. The constitution was intended to avert a part of this danger by leaving the government of this country in the hands of the people rather than in the hands of any monarch. But this safeguard was not enough. Our Founders were no more willing to let the content of their prayers and their privilege of praying whenever they pleased be influenced by the ballot box than they were to let these vital matters of personal conscience depend upon the succession of monarchs. The First Amendment was added to the Constitution to stand as a guarantee that neither the power nor the prestige of the Federal Government would be used to control, support or influence the kinds of prayer the American people can say–that the people's religions must not be subjected to the pressures of government for change each time a new political administration is elected to office. Under that Amendment's prohibition against governmental establishment of religion, as reinforced by the provisions of the Fourteenth Amendment, government in this country, be it state or federal, is without power to prescribe by law any particular form of prayer which is to be used as an official prayer in carrying on any program of governmentally sponsored religious activity.

There can be no doubt that New York's state prayer program officially establishes the religious beliefs embodied in the Regents' prayer. The respondents' argument to the contrary, which is largely based upon the contention that the Regents' prayer is "non-denominational" and the fact that the program, as modified and approved by state courts, does not require all pupils to recite the prayer but permits those who wish to do so to remain silent or be excused from the room, ignores the essential nature of the program's constitutional defects. Neither the fact that the prayer may be denominationally neutral nor the fact that its observance on the part of the students is voluntary can serve to free it from the limitations of the Establishment Clause, as it might from the Free Exercise Clause, of the First Amendment, both of which are operative against the States by virtue of the Fourteenth Amendment. Although these two clauses may in certain instances overlap, they forbid two quite different kinds of governmental encroachment upon religious freedom. The Establishment Clause, unlike the Free Exercise Clause, does not depend upon any showing of direct governmental compulsion and is violated by the enactment of laws which establish an official religion whether those laws operate directly to coerce nonobserving individuals or not. This is not to say, of course, that laws officially prescribing a particular form of religious worship do not involve coercion of such individuals. When the power, prestige and financial support of government is placed behind a particular religious belief, the indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion is plain. But the purposes underlying the Establishment Clause go much further than that. Its first and most immediate purpose rested on the belief that a union of government and religion tends to destroy government and to degrade religion. The history of governmentally established religion, both in England and in this country, showed that whenever govern-

ment had allied itself with one particular form of religion, the inevitable result had been that it had incurred the hatred, disrespect and even contempt of those who held contrary beliefs. That same history showed that many people had lost their respect for any religion that had relied upon the support of government to spread its faith. The Establishment Clause thus stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy, to permit its "unhallowed perversion" by a civil magistrate. Another purpose of the Establishment Clause rested upon an awareness of the historical fact that governmentally established religions and religious persecutions go hand in hand....

It has been argued that to apply the Constitution in such a way as to prohibit state laws respecting an establishment of religious services in public schools is to indicate a hostility toward religion or toward prayer. Nothing, of course, could be more wrong. The history of man is inseparable from the history of religion. And perhaps it is not too much to say that since the beginning of that history many people have devoutly believed that "More things are wrought by prayer than this world dreams of." It was doubtless largely due to men who believed this that there grew up a sentiment that caused men to leave the cross-currents of officially established state religions and religious persecution in Europe and come to this country filled with the hope that they could find a place in which they could pray when they pleased to the God of their faith in the language they chose. And there were men of this same faith in the power of prayer who led the fight for adoption of our Constitution and also for our Bill of Rights with the very guarantees of religious freedom that forbid the sort of governmental activity which New York has attempted here. These men knew that the First Amendment, which tried to put an end to governmental control of religion and of prayer, was not written to destroy either. They knew rather that it was written to quiet well-justified fears which nearly all of them felt arising out of an awareness that governments of the past had shackled men's tongues to make them speak only the religious thoughts that government wanted them to speak and to pray only to the God that government wanted them to pray to. It is neither sacrilegious nor antireligious to say that each separate government in this country should stay out of the business of writing or sanctioning official prayers and leave that purely religious function to the people themselves and to those the people choose to look to for religious guidance.

It is true that New York's establishment of its Regents' prayer as an officially approved religious doctrine of that State does not amount to a total establishment of one particular religious sect to the exclusion of all others—that, indeed, the governmental endorsement of that prayer seems relatively insignificant when compared to the governmental encroachments upon religion which were commonplace 200 years ago. To those who may subscribe to the view that because the Regents' official prayer is so brief and general there can be no danger to religious freedom in its governmental establishment, however, it may be appropriate to say in the words of James Madison, the author of the First Amendment:

"[I]t is proper to take alarm at the first experiment on our liberties.... Who does not see that the same authority which can establish Christianity, in exclusion of all other Religions, may establish with the same ease any particular sect of Christians, in exclusion of all other Sects? That the same authority which can force a citizen to contribute three pence only of his property for the support of any one establishment, may force him to conform to any other establishment in all cases whatsoever?"

The judgment of the Court of Appeals of New York is reversed and the cause remanded for further proceedings not inconsistent with this opinion.

Reading 45: From *Abington School District v. Schempp*, 374 U.S. 203 (1963)

Mr. Justice Clark delivered the opinion of the Court.

Once again we are called upon to consider the scope of the provision of the First Amendment to the United States Constitution which declares that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof..." These companion cases present the issues in the context of state action requiring that schools begin each day with readings from the Bible.... In light of the history of the First Amendment and of our cases interpreting and applying its requirements, we hold that the practices at issue and the laws requiring them are unconstitutional under the Establishment Clause, as applied to the States through the Fourteenth Amendment....

It is true that religion has been closely identified with our history and government.

This is not to say, however, that religion has been so identified with our history and government that religious freedom is not likewise as strongly imbedded in our public and private life. Nothing but the most telling of personal experiences in religious persecution suffered by our forebears, could have planted our belief in liberty of religious opinion any more deeply in our heritage. It is true that this liberty frequently

was not realized by the colonists, but this is readily accountable by their close ties to the Mother Country. However, the views of Madison and Jefferson, preceded by Roger Williams, came to be incorporated not only in the Federal Constitution but likewise in those of most of our States. This freedom to worship was indispensable in a country whose people came from the four quarters of the earth and brought with them a diversity of religious opinion. Today authorities list 83 separate religious bodies, each with membership exceeding 50,000, existing among our people, as well as innumerable smaller groups....

The wholesome "neutrality" of which this Court's cases speak ... stems from a recognition of the teachings of history that powerful sects or groups might bring about a fusion of governmental and religious functions or a concert or dependency of one upon the other to the end that official support of the State or Federal Government would be placed behind the tenets of one or of all orthodoxies. This the Establishment Clause prohibits. And a further reason for neutrality is found in the Free Exercise Clause, which recognizes the value of religious training, teaching and observance and, more particularly, the right of every person to freely choose his own course with reference thereto, free of any compulsion from the state. This the Free Exercise Clause guarantees. Thus, as we have seen, the two clauses may overlap. As we have indicated, the Establishment Clause has been directly considered by this Court eight times in the past score of years and, with only one Justice dissenting on the point, it has consistently held that the clause withdrew all legislative power respecting religious belief or the expression thereof. The test may be stated as follows: what are the purpose and the primary effect of the enactment? If either is the advancement or inhibition of religion then the enactment exceeds the scope of legislative power as circumscribed by the Constitution. That is to say that to withstand the strictures of the Establishment Clause there must be a secular legislative purpose and a primary effect that neither advances nor inhibits religion. The Free Exercise Clause, likewise considered many times here, withdraws from legislative power, state and federal, the exertion of any restraint on the free exercise of religion. Its purpose is to secure religious liberty in the individual by prohibiting any invasions thereof by civil authority. Hence it is necessary in a free exercise case for one to show the coercive effect of the enactment as it operates against him in the practice of his religion. The distinction between the two clauses is apparent—a violation of the Free Exercise Clause is predicated on coercion while the Establishment Clause violation need not be so attended.

Applying the Establishment Clause principles to the cases at bar we find that the States are requiring the selection and reading at the opening of the school day of verses from the Holy Bible and the recitation of the Lord's Prayer by the students in unison. These exercises are prescribed as part of the curricular activities of students who are required by law to attend school. They are held in the school buildings under the supervision and with the participation of teachers employed in those schools. None of these factors, other than compulsory school attendance, was present in the program upheld in *Zorach v. Clauson*. The trial court ... has found that such an opening exercise is a religious ceremony and was intended by the State to be so. We agree with the trial court's finding as to the religious character of the exercises. Given that finding, the exercises and the law requiring them are in violation of the Establishment Clause....

It is insisted that unless these religious exercises are permitted a "religion of secularism" is established in the schools. We agree of course that the State may not establish a "religion of secularism" in the sense of affirmatively opposing or showing hostility to religion, thus "preferring those who believe in no religion over those who do believe." We do not agree, however, that this decision in any sense has that effect. In addition, it might well be said that one's education is not complete without a study of comparative religion or the history of religion and its relationship to the advancement of civilization. It certainly may be said that the Bible is worthy of study for its literary and historic qualities. Nothing we have said here indicates that such study of the Bible or of religion, when presented objectively as part of a secular program of education, may not be effected consistently with the First Amendment. But the exercises here do not fall into those categories. They are religious exercises, required by the States in violation of the command of the First Amendment that the Government maintain strict neutrality, neither aiding nor opposing religion.

Finally, we cannot accept that the concept of neutrality, which does not permit a State to require a religious exercise even with the consent of the majority of those affected, collides with the majority's right to free exercise of religion. While the Free Exercise Clause clearly prohibits the use of state action to deny the rights of free exercise to anyone, it has never meant that a majority could use the machinery of the State to practice its beliefs....

The place of religion in our society is an exalted one, achieved through a long tradition of reliance on the home, the church and the inviolable citadel of the individual heart and mind. We have come to recognize through bitter experience that it is not within the power of government to invade that citadel, whether its purpose or effect be to aid or oppose, to advance or retard. In the relationship between man and religion, the State is firmly committed to a position of neutrality. Though the application of that rule requires interpretation of a delicate sort, the rule itself is clearly and concisely stated in the words of the First Amendment....

Mr. Justice Stewart, dissenting.

I think the records in the two cases before us are so fundamentally deficient as to make impossible an informed or responsible determination of the constitutional issues presented. Specifically, I cannot agree that on these records we can say that the Establishment Clause has necessarily been violated. But I think there exist serious questions under both that provision and the Free Exercise Clause—insofar as each is imbedded in the Fourteenth Amendment—which require the remand of these cases for the taking of additional evidence.

I.

The First Amendment declares that "Congress shall make no law respecting an establishment of religion, or prohibiting free exercise thereof. . . ." It is, I think, a fallacious oversimplification to regard these two provisions as establishing a single constitutional standard of "separation of church and state," which can be mechanically applied in every case to delineate the required boundaries between government and religion. We err in the first place if we do not recognize, as a matter of history and as a matter of the imperatives of our free society, that religion and government must necessarily interact in countless ways. Secondly, the fact is that while in many contexts the Establishment Clause and the Free Exercise Clause fully complement each other, there are areas in which a doctrinaire reading of the Establishment Clause leads to irreconcilable conflict with the Free Exercise Clause.

A single obvious example should suffice to make the point. Spending federal funds to employ chaplains for the armed forces might be said to violate the Establishment Clause. Yet a lonely soldier stationed at some faraway outpost could surely complain that a government which did *not* provide him the opportunity for pastoral guidance was affirmatively prohibiting the free exercise of his religion. And such examples could readily be multiplied. The short of the matter is simply that the two relevant clauses of the First Amendment cannot accurately be reflected in a sterile metaphor which by its very nature may distort rather than illumine the problems involved in a particular case. . . .

I accept without question that the liberty guaranteed by the Fourteenth Amendment against impairment by the States embraces in full the right of free exercise of religion protected by the First Amendment, and I yield to no one in my conception of the breadth of that freedom. I accept too the proposition that the Fourteenth Amendment has somehow absorbed the Establishment Clause, although it is not without irony that a constitutional provision evidently designed to leave the States free to go their own way should now have become a restriction upon their autonomy. But I cannot agree with what seems to me the insensitive definition of the Establishment Clause contained in the Court's opinion, nor with the different but, I think, equally mechanistic definitions contained in the separate opinions which have been filed. . . .

That the central value embodied in the First Amendment—and, more particularly, in the guarantee of "liberty" contained in the Fourteenth—is the safeguarding of an individual's right to free exercise of his religion has been consistently recognized. . . .

It is this concept of constitutional protection embodied in our decisions which makes the cases before us such difficult ones for me. For there is involved in these cases a substantial free exercise claim on the part of those who affirmatively desire to have their children's school day open with the reading of passages from the Bible. . . .

It might also be argued that parents who want their children exposed to religious influences can adequately fulfill that wish off school property and outside school time. With all its surface persuasiveness, however, this argument seriously misconceives the basic constitutional justification for permitting the exercises at issue in these cases. For a compulsory state educational system so structures a child's life that if religious exercises are held to be an impermissible activity in schools, religion is placed at an artificial and state-created disadvantage. Viewed in this light, permission of such exercises for those who want them is necessary if the schools are truly to be neutral in the matter of religion. And a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.

What seems to me to be of paramount importance, then, is recognition of the fact that the claim advanced here in favor of Bible reading is sufficiently substantial to make simple reference to the constitutional phrase "establishment of religion" as inadequate an analysis of the cases before us as the ritualistic invocation of the nonconstitutional phrase "separation of church and state." What these cases compel, rather, is an analysis of just what the "neutrality" is which is required by the interplay of the Establishment and Free Exercise Clauses of the First Amendment, as imbedded in the Fourteenth.

IV.

Our decisions make clear that there is no constitutional bar to the use of government property for religious purposes. On the contrary, this Court has consistently held that the discriminatory barring of religious groups from public property is itself a violation of First and Fourteenth Amendment guarantees. A different standard has been applied to public school property, because of the coercive effect which the use of religious sects of a compulsory school system would necessarily

have upon the children involved. But insofar as the McCollum decision rests on the Establishment rather than the Free Exercise Clause, it is clear that its effect is limited to religious instruction—to government support of proselytizing activities of religious sects by throwing the weight of secular authority behind the dissemination of religious tenets.

The dangers both to government and to religion inherent in official support of instruction in the tenets of various religious sects are absent in the present cases, which involve only a reading from the Bible unaccompanied by comments which might otherwise constitute instruction. Indeed, since, from all that appears in either record, any teacher who does not wish to do so is free not to participate, it cannot even be contended that some infinitesimal part of the salaries paid by the State are made contingent upon the performance of a religious function.

In the absence of evidence that the legislature or school board intended to prohibit local schools from substituting a different set of readings where parents requested such a change, we should not assume that the provisions before us—as actually administered—may not be construed simply as authorizing religious exercises, nor that the designations may not be treated simply as indications of the promulgating body's view as to the community's preference. We are under a duty to interpret these provisions so as to render them constitutional if reasonably possible....

I have said that these provisions authorizing religious exercises are properly to be regarded as measures making possible the free exercise of religion. But it is important to stress that, strictly speaking, what is at issue here is a privilege rather than a right. In other words, the question presented is not whether exercises such as those at issue here are constitutionally compelled, but rather whether they are constitutionally invalid. And that issue, in my view, turns on the question of coercion....

The governmental neutrality which the First and Fourteenth Amendments require in the cases before us, in other words, is the extension of even handed treatment to all who believe, doubt, or disbelieve—a refusal on the part of the State to weight the scales of private choice. In these cases, therefore, what is involved is not state action based on impermissible categories, but rather an attempt by the State to accommodate those differences which the existence in our society of a variety of religious beliefs makes inevitable. The Constitution requires that such efforts be struck down only if they are proven to entail the use of the secular authority of government to coerce a preference among such beliefs....

What our Constitution indispensably protects is the freedom of each of us, be he Jew or Agnostic, Christian or Atheist, Buddhist or Freethinker, to believe or disbelieve, to worship or not worship, to pray or keep silent, according to his own conscience, uncoerced and unrestrained by government. It is conceivable that these school boards, or even all school boards, might eventually find it impossible to administer a system of religious exercises during school hours in such a way as to meet this constitutional standard—in such a way as completely to free from any kind of official coercion those who do not affirmatively want to participate. But I think we must not assume that school boards so lack the qualities of inventiveness and good will as to make impossible the achievement of that goal.

I would remand both cases for further hearings.

Reading 46: From *Lemon v. Kurtzman* and *Earley v. Di Censo*, 403 U.S. 602 (1971)

Mr. Chief Justice Burger delivered the opinion of the Court.

These two appeals raise questions as to Pennsylvania and Rhode Island statutes providing state aid to church-related elementary and secondary schools. Both statutes are challenged as violative of the Establishment and Free Exercise Clauses of the First Amendment and the Due Process Clause of the Fourteenth Amendment....

In *Everson v. Board of Education*, this Court upheld a state statute that reimbursed the parents of parochial school children for bus transportation expenses. There Mr. Justice Black, writing for the majority, suggested that the decision carried to "the verge" of forbidden territory under the Religion Clauses. Candor compels acknowledgment, moreover, that we can only dimly perceive the lines of demarcation in this extraordinarily sensitive area of constitutional law.

The language of the Religion Clauses of the First Amendment is at best opaque, particularly when compared with other portions of the Amendment. Its authors did not simply prohibit the establishment of a state church of a state religion, an area history shows they regarded as very important and fraught with great dangers. Instead they commanded that there should be "no law *respecting* an establishment of religion." A law may be one "respecting" the forbidden objective while falling short of its total realization. A law "respecting" the proscribed result, that is, the establishment of religion, is not always easily identifiable as one violative of the Clause. A given law might not *establish* a state religion but nevertheless be one "respecting" that end in the sense of being a step that could lead to such establishment and hence offend the First Amendment.

In the absence of precisely stated constitutional prohibitions, we must draw lines with reference to the three main evils against which the Establishment Clause was intended to afford protection: "sponsorship, financial support, and active involvement of the sovereign in religious activity."

Every analysis in this area must begin with consideration of the cumulative criteria developed by the Court over many years. Three such tests may be gleaned from our cases. First, the statute must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; [and] finally, the statute must not foster "an excessive government entanglement with religion." ...

The two legislatures, however, have also recognized that church-related elementary and secondary schools have a significant religious mission and that a substantial portion of their activities is religiously oriented. They have therefore sought to create statutory restrictions designed to guarantee the separation between secular and religious educational functions and to ensure that State financial aid supports only the former. All these provisions are precautions taken in candid recognition that these programs approached, even if they did not intrude upon, the forbidden areas under the Religion Clauses. We need not decide whether these legislative precautions restrict the principal or primary effect of the programs to the point where they do not offend the Religion Clauses, for we conclude that the cumulative impact of the entire relationship arising under the statutes in each State involves excessive entanglement between government and religion....

Our prior holdings do not call for total separation between church and state; total separation is not possible in an absolute sense. Some relationship between government and religious organizations is inevitable. Fire inspections, building and zoning regulations, and state requirements under compulsory school-attendance laws are examples of necessary and permissible contacts. Indeed, under the statutory exemption before us in *Walz*, the State had a continuing burden to ascertain that the exempt property was in fact being used for religious worship. Judicial caveats against entanglement must recognize that the line of separation, far from being a "wall," is a blurred, indistinct, and variable barrier depending on all the circumstances of a particular relationship.

This is not to suggest, however, that we are to engage in a legalistic minuet in which precise rules and forms must govern. A true minuet is a matter of pure form and style, the observance of which is itself the substantive end. Here we examine the form of the relationship for the light that it casts on the substance. In order to determine whether the government entanglement with religion is excessive, we must examine the character and purposes of the institutions that are benefited, the nature of the aid that the State provides, and the resulting relationship between the government and the religious authority....

Here we find that both statutes foster an impermissible degree of entanglement....

The potential for political divisiveness related to religious belief and practice is aggravated in these two statutory programs by the need for continuing annual appropriations and the likelihood of larger and larger demands as costs and populations grow. The Rhode Island District Court found that the parochial school system's "monumental and deepening financial crisis" would "inescapably" require larger annual appropriations subsidizing greater percentages of the salaries of lay teachers. Although no facts have been developed in this respect in the Pennsylvania case, it appears that such pressures for expanding aid have already required the state legislature to include a portion of the state revenues from cigarette taxes in the program.

In *Walz* it was argued that a tax exemption for places of religious worship would prove to be the first step in an inevitable progression leading to the establishment of state churches and state religion. That claim could not stand up against more than 200 years of virtually universal practice imbedded in our colonial experience and continuing into the present.

The progression argument, however, is more persuasive here. We have no long history of state aid to church-related educational institutions comparable to 200 years of tax exemption for churches. Indeed, the state programs before us today represent something of an innovation. We have already noted that modern governmental programs have self-perpetuating and self-expanding propensities. These internal pressures are only enhanced when the schemes involve institutions whose legitimate needs are growing and whose interests have substantial political support. Nor can we fail to see that in constitutional adjudication some steps, which when taken were thought to approach "the verge," have become the platform for yet further steps. A certain momentum develops in constitutional theory and it can be a "downhill thrust" easily set in motion but difficult to retard or stop. Development by momentum is not invariably bad; indeed, it is the way the common law has grown, but it is a force to be recognized and reckoned with. The dangers are increased by the difficulty of perceiving in advance exactly where the "verge" of the precipice lies. As well as constituting an independent evil against which the Religion Clauses were intended to protect, involvement or entanglement between government and religion serves as a warning signal.

Finally, nothing we have said can be construed to disparage the role of church-related elementary and secondary schools in our national life. Their contribution has been and is enormous. Nor do we ignore their economic plight in a period of rising costs and expanding need. Taxpayers generally have been spared vast sums by the maintenance of these educational institutions by religious organizations, largely by the gifts of faithful adherents.

The merit and benefits of these schools, however, are not the issue before us in these cases. The sole question is whether state aid to these schools can be squared with the dictates of the Religion Clauses. Under our system the choice has been made that government is to be entirely excluded from the area of religious instruction and churches excluded from the affairs of government. The Constitution decrees that religion must be a private matter for the individual, the family, and the institutions of private choice, and that while some involvement and entanglement are inevitable, lines must be drawn.

Reading 47: From *Tilton v. Richardson*, 403 U.S. 672 (1971)

... Mr. Chief Justice Burger announced the judgment of the Court and an opinion in which Mr. Justice Harlan, Mr. Justice Stewart, and Mr. Justice Blackmun join.

This appeal presents important constitutional questions as to federal aid for church-related colleges and universities under Title I of the Higher Education Facilities Act of 1963, which provides construction grants for buildings and facilities used exclusively for secular educational purposes. We must determine first whether the Act authorizes aid to such church-related institutions, and, if so, whether the Act violates either the Establishment or Free Exercise Clauses of the First Amendment....

Appellants attempted to show that the four recipient institutions were "sectarian" by introducing evidence of their relations with religious authorities, the content of their curricula, and other indicia of their religious character. The sponsorship of these institutions by religious organizations is not disputed. Appellee colleges introduced testimony that they had fully complied with the statutory conditions and that their religious affiliation in no way interfered with the performance of their secular educational functions....

We are satisfied that Congress intended the Act to include all colleges and universities regardless of any affiliation with or sponsorship by a religious body. Congress defined "institutions of higher education," which are able to receive aid under the Act, in broad and inclusive terms....

Numerous cases considered by the Court have noted the internal tension in the First Amendment between the Establishment Clause and the Free Exercise Clause....

Our analysis in this area must begin with a consideration of the cumulative criteria developed over many years and applying to a wide range of governmental action challenged as violative of the Establishment Clause....

Against this background we consider four questions: First, does the Act reflect a secular legislative purpose? Second, is the primary effect of the Act to advance or inhibit religion? Third, does the administration of the Act foster an excessive government entanglement with religion? Fourth, does the implementation of the Act inhibit the free exercise of religion?

The stated legislative purpose ... expresses a legitimate secular objective entirely appropriate for governmental action....

The Act itself was carefully drafted to ensure that the federally subsidized facilities would be devoted to the secular and not the religious function of the recipient institutions. It authorizes grants and loans only for academic facilities that will be used for defined secular purposes and expressly prohibits their use for religious instruction, training, or worship....

There is no evidence that religion seeps into the use of any of these facilities.... Although appellants introduced several institutional documents that stated certain religious restrictions on what could be taught, other evidence showed that these restrictions were not in fact enforced and that the schools were characterized by an atmosphere of academic freedom rather than religious indoctrination....

Although we reject appellants' broad constitutional arguments we do perceive an aspect in which the statute's enforcement provisions are inadequate to ensure that the impact of the federal aid will not advance religion....

Limiting the prohibition for religious use of the structure to 20 years obviously opens the facility to use for any purpose at the end of that period. It cannot be assumed that a substantial structure has no value after that period and hence the unrestricted use of a valuable property is in effect a contribution of some value to a religious body. Congress did not base the 20-year provision on any contrary conclusion. If, at the end of 20 years, the building is, for example, converted into a chapel or otherwise used to promote religious interests, the original federal grant will in part have the effect of advancing religion.

To this extent the Act therefore trespasses on the Religion Clauses. The restrictive obligations of a recipient institution cannot, compatibly with the Religion Clauses, expire while the building has substantial value. This circumstance does not require us to invalidate the entire Act, however....

We next turn to the question of whether excessive entanglements characterize the relationship between government and church under the Act....

Our decision today in *Lemon v. Kurtzman* and *Robinson v. DiCenso* has discussed and applied this independent measure

of constitutionality under the Religion Clauses. There we concluded that excessive entanglements between government and religion were fostered by Pennsylvania and Rhode Island statutory programs under which state aid was provided to parochial elementary and secondary schools....

There are generally significant differences between the religious aspects of church-related institutions of higher learning and parochial elementary and secondary schools. The "affirmative if not dominant policy" of the instruction in pre-college church schools is "to assure future adherents to a particular faith by having control of their total education at an early age." There is substance to the contention that college students are less impressionable and less susceptible to religious indoctrination. Common observation would seem to support that view, and Congress may well have entertained it. The skepticism of the college student is not an inconsiderable barrier to any attempt or tendency to subvert the congressional objectives and limitations.... Many church-related colleges and universities are characterized by a high degree of academic freedom and seek to evoke free and critical responses from their students....

In short, the evidence shows institutions with admittedly religious functions but whose predominant higher education mission is to provide their students with a secular education.

Since religious indoctrination is not a substantial purpose or activity of these church-related colleges and universities, there is less likelihood than in primary and secondary schools that religion will permeate the area of secular education. This reduces the risk that government aid will in fact serve to support religious activities. Correspondingly, the necessity for intensive government surveillance is diminished and the resulting entanglements between government and religion lessened. Such inspection as may be necessary to ascertain that the facilities are devoted to secular education is minimal and indeed hardly more than the inspections that States impose over all private schools within the reach of compulsory education laws.

The entanglement between church and state is also lessened here by the nonideological character of the aid that the Government provides....

Finally, government entanglements with religion are reduced by the circumstance that, unlike the direct and continuing payments under the Pennsylvania program, and all the incidents of regulation and surveillance, the Government aid here is a one-time, single-purpose construction grant. There are no continuing financial relationships or dependencies, no annual audits, and no government analysis of an institution's expenditures on secular as distinguished from religious activities. Inspection as to use is a minimal contact.

No one of these three factors standing alone is necessarily controlling; cumulatively all of them shape a narrow and limited relationship with government which involves fewer and less significant contacts than the two state schemes before us in *Lemon* and *DiCenso*. The relationship therefore has less potential for realizing the substantive evils against which the Religion Clauses were intended to protect.

We think that cumulatively these three factors also substantially lessen the potential for divisive religious fragmentation in the political arena.... The potential for divisiveness inherent in the essentially local problems of primary and secondary schools is significantly less with respect to a college or university whose student constituency is not local but diverse and widely dispersed....

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Marshall concur, dissenting in part....

I dissent not because of any lack of respect for parochial schools but out of a feeling of despair that the respect which through history has been accorded the First Amendment is this day lost.

It should be remembered that in this case we deal with federal grants and with the command that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." The million-dollar grants sustained today put Madison's miserable "three-pence" to shame. But he even thought, as I do, that even a small amount coming out [of] the pocket of taxpayers and going into the coffers of a church was not in keeping with our constitutional ideal.

Reading 48: From *Mueller v. Allen*, 103 S. Ct. 3062 (1983)

Justice Rehnquist delivered the opinion of the Court.

Minnesota allows taxpayers, in computing their state income tax, to deduct certain expenses incurred in providing for the education of their children....

Minnesota, like every other state, provides its citizens with free elementary and secondary schooling. It seems to be agreed that about 820,000 students attended this school system in the most recent school year. During the same year, approximately 91,000 elementary and secondary students attended some 500 privately supported schools located in Minnesota, and about 95% of these students attended schools considering themselves to be sectarian.

Minnesota, by a law originally enacted in 1955 and revised in 1976 and again in 1978, permits state taxpayers to

claim a deduction from gross income for certain expenses incurred in educating their children. The deduction is limited to actual expenses incurred for the "tuition, textbooks and transportation" of dependents attending elementary or secondary schools. A deduction may not exceed $500 per dependent in grades K through six and $700 per dependent in grades seven through twelve.

Petitioners—certain Minnesota taxpayers—sued in the United States District Court for the District of Minnesota claiming that # 290.09 (22) violated the Establishment Clause by providing financial assistance to sectarian institutions....

Today's case is no exception to our oft-repeated statement that the Establishment Clause presents especially difficult questions of interpretation and application....

One fixed principle in this field is our consistent rejection of the argument that "any program which in some manner aids an institution with a religious affiliation" violates the Establishment Clause....

The general nature of our inquiry in this area has been guided, since the decision in *Lemon v. Kurtzman*, by the "three-part" test laid down in that case:

> "First, the statute must have a secular legislative purpose; second, its principle or primary effect must be one that neither advances nor inhibits religion ...; finally, the statute must not foster 'an excessive government entanglement with religion.'"

While this principle is well settled, our cases have also emphasized that it provides "no more than [a] helpful signpost" in dealing with Establishment Clause challenges....

Little time need be spent on the question of whether the Minnesota tax deduction has a secular purpose. Under our prior decisions, governmental assistance programs have consistently survived this inquiry even when they have run afoul of other aspects of the *Lemon* framework....

A state's decision to defray the cost of educational expenses incurred by parents—regardless of the type of schools their children attend—evidences a purpose that is both secular and understandable. An educated populace is essential to the political and economic health of any community, and a state's efforts to assist parents in meeting the rising cost of educational expenses plainly serves this secular purpose of ensuring that the state's citizenry is well-educated. Similarly, Minnesota, like other states, could conclude that there is a strong public interest in assuring the continued financial health of private schools, both sectarian and non-sectarian. By educating a substantial number of students such schools relieve public schools of a correspondingly great burden—to the benefit of all taxpayers....

We turn therefore to the more difficult but related question whether the Minnesota statute has "the primary effect of advancing the sectarian aims of the nonpublic schools."...

Under our prior decisions, the Minnesota legislature's judgment that a deduction for educational expenses fairly equalizes the tax burden of its citizens and encourages desirable expenditures for educational purposes is entitled to substantial deference....

The Establishment Clause of course extends beyond prohibition of a state church or payment of state funds to one or more churches. We do not think, however, that its prohibition extends to the type of tax deduction established by Minnesota. The historic purposes of the clause simply do not encompass the sort of attenuated financial benefit, ultimately controlled by the private choices of individual parents, that eventually flows to parochial schools from the neutrally available tax benefit at issue in this case....

Finally, private educational institutions, and parents paying for their children to attend these schools, make special contributions to the areas in which they operate. "Parochial schools, quite apart from their sectarian purpose, have provided an educational alternative for millions of young Americans; they often afford wholesome competition with our public schools; and in some States they relieve substantially the tax burden incident to the operation of public schools."...

More fundamentally, whatever unequal effect may be attributed to the statutory classification can fairly be regarded as a rough return for the benefits, discussed above, provided to the state and all taxpayers by parents sending their children to parochial schools. In the light of all this, we believe it wiser to decline to engage in the type of empirical inquiry into those persons benefited by state law which petitioners urge....

Justice Marshall, with whom Justice Brennan, Justice Blackmun and Justice Stevens join, dissenting.

The Establishment Clause of the First Amendment prohibits a State from subsidizing religious education, whether it does so directly or indirectly. In my view, this principle of neutrality forbids any tax benefit, including the tax deduction at issue here, which subsidizes tuition payments to sectarian schools. I also believe that the Establishment Clause prohibits the tax deductions that Minnesota authorizes for the cost of books and other instructional materials used for sectarian purposes....

That the Minnesota statute makes some small benefit available to all parents cannot alter the fact that the most substantial benefit provided by the statute is available only to those parents who send their children to schools that charge tuition. It is simply undeniable that the single largest expense that may be deducted under the Minnesota statute is tuition. The statute is little more than a subsidy of tuition masquerad-

ing as a subsidy of general educational expenses. The other deductible expenses are *de minimis* in comparison to tuition expenses....

That this deduction has a primary effect of promoting religion can easily be determined without any resort to the type of "statistical evidence" that the majority fears would lead to constitutional uncertainty....

In this case, it is undisputed that well over 90% of the children attending tuition-charging schools in Minnesota are enrolled in sectarian schools. History and experience likewise instruct us that any generally available financial assistance for elementary and secondary school tuition expenses mainly will further religious education because the majority of the schools which charge tuition are sectarian....

Because Minnesota, like every other State, is committed to providing free public education, tax assistance for tuition payments inevitably redounds to the benefit of non-public, sectarian schools and parents who send their children to those schools....

In my view, Minnesota's tax deduction for the cost of textbooks and other instructional materials is also constitutionally infirm. The majority is simply mistaken in concluding that a tax deduction, unlike a tax credit or a direct grant to parents, promotes religious education in a manner that is only "attenuated." A tax deduction has a primary effect that advances religion if it is provided to offset expenditures which are not restricted to the secular activities of parochial schools....

There can be little doubt that the State of Minnesota intended to provide, and has provided, "[s]ubstantial aid to the educational function of [church-related] schools," and that the tax deduction for tuition and other educational expenses "necessarily results in aid to the sectarian school enterprise as a whole." It is beside the point that the State may have legitimate secular reasons for providing such aid. In focusing upon the contributions made by church-related schools, the majority has lost sight of the issue before us in this case.

Questions for Discussion

1. Justice Black in *Engel* wanted to assure the public that the Court in its ruling was not hostile to religion. Why was Black unsuccessful? Does the decision really drive prayer from the public schools?

2. In the Bible-reading case, Justice Clark tried to be more solicitous of the critics of *Engel*. Did he succeed? Is his opinion or Justice Stewart's dissent more convincing? Why?

3. The Court has recently tried to accommodate religious practices within the First Amendment. Why, even with significant changes in membership, is the High Bench so convinced that officially-sponsored school prayer offends the establishment clause?

4. Do you consider the test detailed in *Lemon* useful in deciding claims that the no-establishment clause has been violated? As a personal matter, would you favor the type of aid that Pennsylvania and Rhode Island tried to provide?

5. Does it seem strange to you that the Court held that substantial financial aid given directly by the federal government to sectarian colleges does not violate the establishment clause? Can you make sense of the decision?

6. Do you believe that providing tax benefits to parents of children attending church-related schools is a desirable practice? Does it serve a secular purpose?

Chapter Eight

Historical Exceptions: Does Custom Equal Constitutionality?

Some critics of the Court's decisions on the religion clauses have accused the Justices of distorting the historical record in part by ignoring long-term practices of the nation's people. They argue that an interpretation of the general language of the religion clauses divorced from such practices serves neither the Constitution nor the society at all well. Recently, the Justices have heeded such criticism, for many of them have stressed the need to be flexible in interpreting the barriers the First Amendment poses. The result has been an increasing accommodation of certain practices by the Supreme Court's ruling that they do not violate the clause against establishment.

Tax exemptions for churches can be traced back to colonial times, but only in 1970 did the Court confront a claim testing the constitutionality of the practice. Relying upon this tradition, a majority of the Justices pronounced the exemption constitutional (Reading 49). For them, it served a valid secular purpose.

Then, in 1983, the Court put its stamp of approval upon the practice of legislative bodies employing chaplains to begin each session with a prayer (Reading 50). The tradition, here, went back to the latter eighteenth century. Dissenting Justices argued that custom should not determine the constitutional question, but the majority seemed content with the support history gave to their decision.

What about a historical practice without such lineage? That was the issue presented to the Court in *Lynch v. Donnelly* in the form of a city-owned creche erected as part of a Christmas display. Once again, though, the majority, obviously worried about the effect of a negative decision on many of the other obviously religious practices of the Christmas season, saw no violation of the no-establishment clause (Reading 51). The dissenters harshly criticized their colleagues for making inroads on the protections afforded by the First Amendment.

The opinions presented in the cases below give you a good opportunity to determine for yourself the proper relationship between custom and constitutionality. Also, the decisions raise the question of the cost of government accommodation of religious practice. To pass the constitutional test, the practice must be explained as having a primary secular value. With such Court accommodation, is religion helped or hindered?

Reading 49: From *Walz v. Tax Commission*, 397 U.S. 664 (1970)

Mr. Chief Justice Burger delivered the opinion of the Court....

The essence of appellant's contention was that the New York State Tax Commission's grant of an exemption to church property indirectly requires the appellant to make a contribution to religious bodies and thereby violates provisions prohibiting establishment of religion under the First Amendment which under the Fourteenth Amendment is binding on the States....

Prior opinions of this Court have discussed the development and historical background of the First Amendment in detail....

It is sufficient to note that for the men who wrote the Religious Clauses of the First Amendment the "establishment" of a religion connoted sponsorship, financial support, and active involvement of the sovereign in religious activity....

The Establishment and Free Exercise Clauses of the First Amendment are not the most precisely drawn portions of the Constitution. The sweep of the absolute prohibitions in the Religion Clauses may have been calculated; but the purpose was to state an objective not to write a statute. In attempting to articulate the scope of the two Religious Clauses, the Court's opinions reflect the limitations inherent in formulating general principles on a case-by-case basis. The considerable internal inconsistency in the opinions of the Court

derives from what, in retrospect, may have been too sweeping utterances on aspects of these clauses that seemed clear in relation to the particular cases but have limited meaning as general principles.

The Court has struggled to find a neutral course between the two Religion Clauses, both of which are cast in absolute terms, and either of which, if expanded to a logical extreme, would tend to clash with the other....

The course of constitutional neutrality in this area cannot be an absolutely straight line; rigidity could well defeat the basic purpose of these provisions, which is to insure that no religion be sponsored or favored, none commanded, and none inhibited. The general principle deducible from the First Amendment and all that has been said by the Court is this: that we will not tolerate either governmentally established religion or governmental interference with religion. Short of those expressly proscribed governmental acts there is room for play ... productive of a benevolent neutrality which will permit religious exercise to exist without sponsorship and without interference.

Each value judgment under the Religion Clauses must therefore turn on whether particular acts in question are intended to establish or interfere with religious beliefs and practices or have the effect of doing so. Adherence to the policy of neutrality that derives from an accommodation of the Establishment and Free Exercise Clauses has prevented the kind of involvement that would tip the balance toward government control of churches or governmental restraint on religious practice.

Adherents of particular faiths and individual churches frequently take strong positions on public issues including, as this case reveals in the several briefs *amici*, vigorous advocacy of legal or constitutional positions. Of course, churches as much as secular bodies and private citizens have that right. No perfect or absolute separation is really possible; the very existence of the Religion Clauses is an involvement of sorts—one which seeks to mark boundaries to avoid excessive entanglement....

The legislative purpose of a property tax exemption is neither the advancement nor the inhibition of religion; it is neither sponsorship nor hostility. New York, in common with the other States, has determined that certain entities that exist in a harmonious relationship to the community at large, and that foster its "moral or mental improvement," should not be inhibited in their activities by property taxation or the hazard of loss of those properties for nonpayment of taxes. It has not singled out one particular church or religious group or even churches as such; rather, it has granted exemption to all houses of religious worship within a broad class of property owned by non-profit, quasi-public corporations which include hospitals, libraries, playgrounds, scientific, professional, historical and patriotic groups. The State has an affirmative policy that considers these groups as beneficial and stabilizing influences in community life and finds this classification useful, desirable, and in the public interest....

Governments have not always been tolerant of religious activity, and hostility toward religion has taken many shapes and forms—economic political, and sometimes harshly oppressive. Grants of exemption historically reflect the concern of authors of constitutions and statutes as to the latent dangers inherent in the imposition of property taxes; exemption constitutes a reasonable and balanced attempt to guard against those dangers. The limits of permissible state accommodation to religion are by no means co-extensive with the noninterference mandated by the Free Exercise Clause. To equate the two would be to deny a national heritage with roots in the Revolution itself....

We cannot read New York's statute as attempting to establish religion; it is simply sparing the exercise of religion from the burden of property taxation levied on private profit institutions.

We find it unnecessary to justify the tax exemption on the social welfare services or "good works" that some churches perform for parishioners and others—family counseling, aid to the elderly and the infirm, and to children. Churches vary substantially in the scope of such services; programs expand or contract according to resources and need....

To give emphasis to so variable an aspect of the work of religious bodies would introduce an element of governmental evaluation and standards as to the worth of particular social welfare programs, thus producing a kind of continuing day-to-day relationship which the policy of neutrality seeks to minimize. Hence, the use of a social welfare yardstick as a significant element to qualify for tax exemption could conceivably give rise to confrontations that could escalate to constitutional dimensions.

Determining that the legislative purpose of tax exemption is not aimed at establishing, sponsoring, or supporting religion does not end the inquiry, however. We must also be sure that the end result—the effect—is not an excessive government entanglement with religion....

Granting tax exemption to churches necessarily operates to afford an indirect economic benefit and also gives rise to some, but yet a lesser, involvement than taxing them....

The grant of a tax exemption is not sponsorship since the government does not transfer part of its revenue to churches but simply abstains from demanding that the church support the state. No one has ever suggested that tax exemption has converted libraries, art galleries, or hospitals into arms of the state or employees "on the public payroll." There is no genuine nexus between tax exemption and establishment of religion....

The exemption creates only a minimal and remote involvement between church and state and far less than taxation of churches. It restricts the fiscal relationship between church and state, and tends to complement and reinforce the desired separation insulating each from the other.

Separation in this context cannot mean absence of all contact; the complexities of modern life inevitably produce some contact and the fire and police protection received by houses of religious worship are no more than incidental benefits accorded all persons or institutions within a State's boundaries, along with many other exempt organizations. The appellant has not established even an arguable quantitative correlation between the payment of an ad valorem property tax and the receipt of these municipal benefits.

All of the 50 States provide for tax exemption of places of worship, most of them doing so by constitutional guarantees. For so long as federal income taxes have had any potential impact on churches—over 75 years—religious organizations have been expressly exempt from the tax. Such treatment is an "aid" to churches no more and no less in principle than the real estate tax exemption granted by States. Few concepts are more deeply embedded in the fabric of our national life, beginning with pre-Revolutionary colonial times, than for the government to exercise at the very least this kind of benevolent neutrality toward churches and religious exercise generally so long as none was favored over others and none suffered interference.

It is significant that Congress, from its earliest days, has viewed the religion clauses of the Constitution as authorizing statutory real estate tax exemption to religious bodies....

It is obviously correct that no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it. Yet an unbroken practice of according the exemption to churches, openly and by affirmative state action, not covertly or by state inaction, is not something to be lightly cast aside.

Nothing in this national attitude toward religious tolerance and two centuries of uninterrupted freedom from taxation has given the remotest sign of leading to an established church or religion and on the contrary it has operated affirmatively to help guarantee the free exercise of all forms of religious beliefs. Thus, it is hardly useful to suggest that tax exemption is but the "foot in the door" or the "nose of the camel in the tent" leading to an established church....

It is interesting to note that while the precise question we now decide has not been directly before the Court previously, the broad question was discussed by the Court in relation to real estate taxes assessed nearly a century ago on land owned by and adjacent to a church in Washington, D.C. At that time Congress granted real estate tax exemptions to buildings devoted to art, to institutions of public charity, libraries, cemeteries, and "church buildings, and grounds actually occupied by such buildings."...

It appears that at least up to 1885 this Court, reflecting more than a century of our history and uninterrupted practice, accepted without discussion the proposition that federal or state grants of tax exemption to churches were not a violation of the Religious Clauses of the First Amendment. As to the New York statute, we now confirm that view....

The existence from the beginning of the Nation's life of a practice, such as tax exemptions for religious organizations, is not conclusive of its constitutionality. But such practice is a fact of considerable import in the interpretation of abstract constitutional language. On its face, the Establishment Clause is reasonably susceptible of different interpretations regarding the exemptions. This Court's interpretation of the clause, accordingly, is appropriately influenced by the reading it has received in the practices of the Nation....

The more longstanding and widely accepted a practice, the greater its impact upon constitutional interpretation. History is particularly compelling in the present case because of the undeviating acceptance given religious tax exemptions from our earliest days as a Nation. Rarely if ever has this Court considered the constitutionality of a practice for which the historical support is so overwhelming....

The exemptions have continued uninterrupted to the present day. They are in force in all 50 States. No judicial decision, state or federal, has ever held that they violate the Establishment Clause....

Government has two basic secular purposes for granting real property tax exemptions to religious organizations. First, these organizations are exempted because they, among a range of other private, nonprofit organizations contribute to the well-being of the community in a variety of nonreligious ways, and thereby bear burdens that would otherwise either have to be met by general taxation, or be left undone, to the detriment of the community....

Second, government grants exemptions to religious organizations because they uniquely contribute to the pluralism of American society by their religious activities. Government may properly include religious institutions among the variety of private, nonprofit groups which receive tax exemptions, for each group contributes to the diversity of association, viewpoint and enterprise essential to a vigorous, pluralistic society....

Against the background of this survey of the history, purpose and operation of religious tax exemptions, I must conclude that the exemptions do not "serve the essentially religious activities of religious institutions." Their principal effect is to carry out secular purposes—the encouragement of public service activities and of a pluralistic society. During their ordi-

nary operations, most churches engage in activities of a secular nature which benefit the community; and all churches by their existence contribute to the diversity of association, viewpoint, and enterprise so highly valued by all of us....

Finally, I do not think that the exemptions "use essentially religious means to serve governmental ends, where secular means would suffice." The means churches use to carry on their public service activities are not "essentially religious" in nature. They are the same means used by any purely secular organization—money, human time and skills, physical facilities. It is true that each church contributes to the pluralism of our society through its purely religious activities, but that state encourages these activities not because it champions religion *per se* but because it values religion among a variety of private, nonprofit enterprises which contribute to the diversity of the Nation. Viewed in this light, there is no nonreligious substitute for religion as an element in our societal mosaic, just as there is no nonliterary substitute for literary groups.

Mr. Justice Douglas, dissenting.

Petitioner is the owner of real property in New York and is a Christian. But he is not a member of any of the religious organizations, "rejecting them as hostile." The New York statute exempts from taxation real property "owned by a corporation or association organized exclusively for * * * religious * * * purposes" and used "exclusively for carrying out" such purpose. Yet nonbelievers who own realty are taxed at the usual rate. The question in the case therefore is whether believers—organized in church groups—can be made exempt from real estate taxes, merely because they are believers while non-believers, whether organized or not, must pay the real estate taxes....

In affirming this judgment the Court largely overlooks the revolution initiated by the adoption of the Fourteenth Amendment. That revolution involved the imposition of new and far-reaching constitutional restraints on the States. Nationalization of many civil liberties has been the consequence of the Fourteenth Amendment, reversing the historic position that the foundations of those liberties rested largely in state law.

The process of the "selective incorporation" of various provisions of the Bill of Rights into the Fourteenth Amendment, although often provoking lively disagreement at large as well as among the members of this Court, has been a steady one....

Those developments in the last 30 years have had unsettling effects. It was, for example, not until 1962 that state-sponsored, sectarian prayers were held to violate the Establishment Clause. That decision brought many protests, for the habit of putting one sect's prayer in public schools had long been practiced. Yet if the Catholics, controlling one school board, could put their prayer into one group of public schools, the Mormons, Baptists, Moslems, Presbyterians, and others could do the same, once they got control. And so the seeds of Establishment would grow and a secular institution would be used to serve a sectarian end....

Hence the question in the present case makes irrelevant the "two centuries of uninterrupted freedom from taxation," referred to by the Court. If history be our guide, then tax exemption of church property in this country is indeed highly suspect, as it arose in the early days when the church was an agency of the state....

The question here, though, concerns the meaning of the Establishment Clause and the Free Exercise Clause made applicable to the States for only a few decades at best....

That is a major difference between churches on the one hand and the rest of the nonprofit organizations on the other. Government could provide or finance operas, hospitals, historical societies, and all the rest because they represent social welfare programs within the reach of the police power. In contrast, government may not provide or finance worship because of the Establishment Clause any more than it may single out "atheistic" or "agnostic" centers or groups and create or finance them....

On the record of this case, the church *qua* nonprofit, charitable organization is intertwined with the church *qua* church. A church may use the same facilities, resources, and personnel in carrying out both its secular and its sectarian activities. The two are unitary and on the present record have not been separated one from the other. The state has a public policy of encouraging private public welfare organizations, which it desires to encourage through tax exemption. Why may it not do so and include churches *qua* welfare organizations on a nondiscriminatory basis? That avoids, it is argued, a discrimination against churches and in a real sense maintains neutrality toward religion which the First Amendment was designed to foster. Welfare services, whether performed by churches or by nonreligious groups, may well serve the public welfare.

Whether a particular church seeking an exemption for its welfare work could constitutionally pass muster would depend on the special facts. The assumption is that the church is a purely private institution, promoting a sectarian cause. The creed, teaching, and beliefs of one may be undesirable or even repulsive to others. Its sectarian faith sets it apart from all others and makes it difficult to equate its constituency with the general public. The extent that its facilities are open to all may only indicate the nature of its proselytism. Yet though a church covers up its religious symbols in welfare work its welfare activities may merely be a phase of sectarian activity. I have said enough to indicate the nature of this tax exemption problem.

Direct finanical aid to churches or tax exemptions to the church *qua* church is not, in my view, even arguably permitted. Sectarian causes are certainly not antipublic and many would rate their own church or perhaps all churches as the highest form of welfare. The difficulty is that sectarian causes must remain in the private domain not subject to public control or subsidy. That seems to me to be the requirement of the Establishment Clause....

If believers are entitled to public financial support, so are nonbelievers. A believer and nonbeliever under the present law are treated differently because of the articles of their faith. Believers are doubtless comforted that the cause of religion is being fostered by this legislation. Yet one of the mandates of the First Amendment is to promote a viable, pluralistic society and to keep government neutral, not only between sects but between believers and non-believers. The present involvement of government in religion may seem *de minimis*. But it is, I fear, a long step down the Establishment path. Perhaps I have been misinformed. But as I have read the Constitution and its philosophy, I gathered that independence was the price of liberty.

I conclude that this tax exemption is unconstitutional.

Reading 50: From *Marsh v. Chambers*, 103 S. Ct. 3330 (1983)

Chief Justice Burger delivered the opinion of the Court.

The question presented is whether the Nebraska Legislature's practice of opening each legislative day with a prayer by a chaplain paid by the State violates the Establishment Clause of the First Amendment.

The Nebraska Legislature begins each of its sessions with a prayer offered by a chaplain who is chosen biennially by the Executive Board of the Legislative Council and paid out of public funds. Robert E. Palmer, a Presbyterian minister, has served as chaplain since 1965 at a salary of $319.75 per month for each month the legislature is in session.

Ernest Chambers is a member of the Nebraska Legislature and a taxpayer of Nebraska. Claiming that the Nebraska Legislature's chaplaincy practice violates the Establishment Clause of the First Amendment, he brought this action seeking to enjoin enforcement of the practice....

The opening of sessions of legislative and other deliberative public bodies with prayer is deeply embedded in the history and tradition of this country. From colonial times through the founding of the Republic and ever since, the practice of legislative prayer has coexisted with the principles of disestablishment and religious freedom. In the very courtrooms in which the United States District Judge and later three Circuit Judges heard and decided this case, the proceedings opened with an announcement that concluded, "God save the United States and this Honorable Court." The same invocation occurs at all sessions of this Court.

The tradition in many of the colonies was of course, linked to an established church, but the Continental Congress, beginning in 1774, adopted the traditional procedure of opening its sessions with a prayer offered by a paid chaplain....

On Sept. 25, 1789, three days after Congress authorized the appointment of paid chaplains, final agreement was reached on the language of the Bill of Rights....

Clearly the men who wrote the First Amendment Religion Clause did not view paid legislative chaplains and opening prayers as a violation of that Amendment, for the practice of opening sessions with prayer has continued without interruption ever since that early session of Congress. It has also been followed consistently in most of the states, including Nebraska, where the institution of opening legislative sessions with prayer was adopted even before the State attained statehood.

Standing alone, historical patterns cannot justify contemporary violations of constitutional guarantees, but there is far more here than simply historical patterns. In this context, historical evidence sheds light not only on what the draftsmen intended the Establishment Clause to mean, but also on how they thought that Clause applied to the practice authorized by the First Congress—their actions reveal their intent....

No more is Nebraska's practice of over a century, consistent with two centuries of national practice, to be cast aside. It can hardly be thought that in the same week Members of the First Congress voted to appoint and to pay a Chaplain for each House and also voted to approve the draft of the First Amendment for submission to the States, they intended the Establishment Clause of the Amendment to forbid what they had just declared acceptable. In applying the First Amendment to the states through the Fourteenth Amendment, it would be incongruous to interpret that clause as imposing more stringent First Amendment limits on the States than the draftsmen imposed on the Federal Government.

This unique history leads us to accept the interpretation of the First Amendment draftsmen who saw no real threat to the Establishment Clause arising from a practice of prayer similar to that now challenged. We conclude that legislative prayer presents no more potential for establishment than the provision of school transportation....

We do not agree that evidence of opposition to a measure weakens the force of the historical argument; indeed it infuses it with power by demonstrating that the subject was considered carefully and the action not taken thoughtlessly, by force of long tradition and without regard to the problems posed by a pluralistic society....

In light of the unambiguous and unbroken history of more than 200 years, there can be no doubt that the practice of opening legislative sessions with prayer has become part of the fabric of our society. To invoke Divine guidance on a public body entrusted with making the laws is not, in these circumstances, an "establishment" of religion or a step toward establishment; it is simply a tolerable acknowledgment of beliefs widely held among the people of this country....

Justice Brennan, with whom Justice Marshall joins, dissenting.

The Court today has written a narrow and, on the whole, careful opinion. In effect, the Court holds that officially sponsored legislative prayer, primarily on account of its "unique history," is generally exempted from the First Amendment's prohibition against "the establishment of religion." The Court's opinion is consistent with dictum in at least one of our prior decisions, and its limited rationale should pose little threat to the overall fate of the Establishment Clause. Moreover, disagreement with the Court requires that I confront the fact that some twenty years ago, in a concurring opinion in one of the cases striking down official prayer and ceremonial Bible reading in the public schools, I came very close to endorsing essentially the result reached by the Court today. Nevertheless, after much reflection, I have come to the conclusion that I was wrong then and that the Court is wrong today. I now believe that the practice of official invocational prayer, as it exists in Nebraska and most other State Legislatures, is unconstitutional. It is contrary to the doctrine as well the underlying purposes of the Establishment Clause, and it is not saved either by its history or by any of the other considerations suggested in the Court's opinion.

I respectfully dissent....

That the "purpose" of legislative prayer is preeminently religious rather than secular seems to me to be self-evident. "To invoke Divine guidance on a public body entrusted with making the laws," is nothing but a religious act. Moreover, whatever secular functions legislative prayer might play—formally opening the legislative session, getting the members of the body to quiet down, and imbuing them with a sense of seriousness and high purpose—could so plainly be performed in a purely nonreligious fashion that to claim a secular purpose for the prayer is an insult to the perfectly honorable individuals who instituted and continue the practice.

The "primary effect" of legislative prayer is also clearly religious. As we said in the context of officially sponsored prayers in the public schools, "prescribing a particular form of religious worship," even if the individuals involved have the choice not to participate, places "indirect coercive pressure upon religious minorities to conform to the prevailing officially approved religion..."

More importantly, invocations in Nebraska's legislative halls explicitly link religious belief and observance to the power and prestige of the State. "[T]he mere appearance of a joint exercise of legislative authority by Church and State provides a significant symbolic benefit to religion in the minds of some by reason of the power conferred."...

Finally, there can be no doubt that the practice of legislative prayer leads to excessive "entanglement" between the State and religion. *Lemon* pointed out that "entanglement" can take two forms: First, a state statute or program might involve the state impermissibly in monitoring and overseeing religious affairs. In the case of legislative prayer, the process of choosing a "suitable" chaplain, whether on a permanent or rotating basis, and insuring that the chaplain limits himself or herself to "suitable" prayers, involves precisely the sort of supervision that agencies of government should if at all possible avoid.

Second, excessive "entanglement" might arise out of "the divisive political potential" of a state statute or program.

In this case, this second aspect of entanglement is also clear. The controversy between Senator Chambers and his colleagues, which had reached the state of difficulty and rancor long before this lawsuit was brought, has split the Nebraska Legislature precisely on issues of religion and religious conformity....

In sum, I have no doubt that, if any group of law students were asked to apply the principles of *Lemon* to the question of legislative prayer, they would nearly unanimously find the practice to be unconstitutional.

The path of formal doctrine, however, can only imperfectly capture the nature and importance of the issues at stake in this case. A more adequate analysis must therefore take into account the underlying function of the Establishment Clause, and the forces that have shaped its doctrine.

Most of the provisions of the Bill of Rights, even if they are not generaly enforceable in the absence of state action, nevertheless arise out of moral intuitions applicable to individuals as well as governments. The Establishment Clause, however, is quite different. It is, to its core, nothing less and nothing more than a statement about the proper role of *government* in the society that we have shaped for ourselves in this land....

The principles of "separation" and "neutrality" implicit in the Establishment Clause serve many purposes. Four of these are particularly relevant here.

The first, which is most closely related to the more general conceptions of liberty found in the remainder of the First Amendment, is to guarantee the individual right to con-

science. The right to conscience, in the religious sphere, is not only implicated when the government engages in direct or indirect coercion. It is also implicated when the government requires individuals to support the practices of a faith with which they do not agree....

The second purpose of separation and neutrality is to keep the state from interfering in the essential autonomy of religious life, either by taking upon itself the decision of religious issues, or by unduly involving itself in the supervision of religious institutions or officials.

The third purpose of separation and neutrality is to prevent the trivialization and degradation of religion by too close an attachment to the organs of government. The Establishment Clause "stands as an expression of principle on the part of the Founders of our Constitution that religion is too personal, too sacred, too holy to permit its 'unhallowed perversion' by a civil magistrate...."

Finally, the principles of separation and neutrality help assure that essentially religious issues, precisely because of their importance and sensitivity, not become the occasion for battle in the political arena....

With regard to most issues, the Government may be influenced by partisan argument and may act as a partisan itself. In each case, there will be winners and losers in the political battle, and the losers' most common recourse is the right to dissent and the right to fight the battle again another day. With regard to matters that are essentially religious, however, the Establishment Clause seeks that there should be no political battles, and that no American should at any point feel alienated from his government because that government has declared or acted upon some "official" or "authorized" point of view on a matter of religion....

Legislative prayer clearly violates the principles of neutrality and separation that are embedded within the Establishment Clause. It is contrary to the fundamental message of *Engel* and *Schempp*. It intrudes on the right to conscience by forcing some legislators either to participate in a "prayer opportunity" with which they are in basic disagreement, or to make their disagreement a matter of public comment by declining to participate. It forces all residents of the State to support a religious exercise that may be contrary to their own beliefs. It requires the State to commit itself on fundamental theological issues. It has the potential for degrading religion by allowing a religious call to worship to be intermeshed with a secular call to order. And it injects religion into the political sphere by creating the potential that each and every selection of a chaplain, or consideration of a particular prayer, or even reconsideration of the practice itself, will provoke a political battle along religious lines and ultimately alienate some religiously identified group of citizens....

First, it is significant that the Court's historical argument does not rely on the legislative history of the Establishment Clause itself. Indeed, that formal history is profoundly unilluminating on this and most other subjects. Rather, the Court assumes that the Framers of the Establishment Clause would not have themselves authorized a practice that they thought violated the guarantees contained in the clause. This assumption, however, is questionable. Legislators, influenced by the passions and exigencies of the moment, the pressure of constituents and colleagues, and the press of business, do not always pass sober constitutional judgment on every piece of legislation they enact, and this must be assumed to be as true of the members of the First Congress as any other....

The Court's main argument for carving out an exception sustaining legislative prayer is historical. The Court cannot—and does not—purport to find a pattern of "undeviating acceptance." ...

Second, the Court's analysis treats the First Amendment simply as an Act of Congress, as to whose meaning the intent of Congress is the single touchstone. Both the Constitution and its amendments, however, became supreme law only by virtue of their ratification by the States, and the understanding of the States should be as relevant to our analysis as the understanding of Congress....

This observation is especially compelling in considering the meaning of the Bill of Rights. The first 10 Amendments were not enacted because the members of the First Congress came up with a bright idea one morning; rather, their enactment was forced upon Congress by a number of the States as a condition for their ratification of the original Constitution....

Finally, and most importantly, the argument tendered by the Court is misguided because the Constitution is not a static document whose meaning on every detail is fixed for all time by the life experience of the Framers. We have recognized in a wide variety of constitutional contexts that the practices that were in place at the time any particular guarantee was enacted into the Constitution do not necessarily fix forever the meaning of that guarantee. To be truly faithful to the Framers, "our use of the history of their time must limit itself to broad purposes, not specific practices."...

Our primary task must be to translate "the majestic generalities of the Bill of Rights, conceived as part of the pattern of liberal government in the eighteenth century, into concrete restraints on officials dealing with the problems of the twentieth century...."

The inherent adaptability of the Constitution and its amendments is particularly important with respect to the Establishment Clause. "[O]ur religious composition makes us a vastly more diverse people than were our forefathers.... In the face of such profound changes, practices which may have

been objectionable to no one in the time of Jefferson and Madison may today be highly offensive to many persons, the deeply devout and the nonbelievers alike." . . .

. . . The members of the First Congress should be treated, not as sacred figures whose every action must be emulated, but as the authors of a document meant to last for the ages. Indeed, a proper respect for the Framers themselves forbids us to give so static and lifeless a meaning to their work. To my mind, the Court's focus here on a narrow piece of history is, in a fundamental sense, a betrayal of the lessons of history.

Of course, the Court does not rely entirely on the practice of the First Congress in order to validate legislative prayer. There is another theme which, although implicit, also pervades the Court's opinion. It is exemplified by the Court's comparison of legislative prayer with the formulaic recitation of "God save the United States and this Honorable Court." . . .

First of all, as Justice Stevens' dissent so effectively highlights, legislative prayer, unlike mottos with fixed wordings, can easily turn narrowly and obviously sectarian. I agree with the Court that the federal judiciary should not sit as a board of censors on individual prayers, but to my mind the better way of avoiding that task is by strking down all official legislative invocations.

More fundamentally, however, *any* practice of legislative prayer, even if it might look "non-sectarian" to nine Justices of the Supreme Court, will inevitably and continuously involve the state in one or another religious debate. Prayer is serious business—serious theological business—and it is not a mere "acknowledgment of beliefs widely held among the people of this country" for the State to immerse itself in that business. . . .

. . . In this case, we are faced with potential religious objections to an activity at the very center of religious life, and it is simply beyond the competence of government, and inconsistent with our conceptions of liberty, for the state to take upon itself the role of ecclesiastical arbiter. . . .

The argument is made occasionally that a strict separation of religion and state robs the nation of its spiritual identity. I believe quite the contrary. It may be true that individuals cannot be "neutral" on the question of religion. But the judgment of the Establishment Clause is that neutrality by the organs of *government* on questions of religion is both possible and imperative. . . .

If the Court had struck down legislative prayer today, it would likely have stimulated a furious reaction. But it would also, I am convinced, have invigorated both the "spirit of religion" and the "spirit of freedom."

Reading 51: From *Lynch v. Donnelly*, 104 S. Ct. 1355 (1984)

The Chief Justice delivered the opinion of the Court.

We granted certiorari to decide whether the Establishment Clause of the First Amendment prohibits a municipality from including a creche, or Nativity scene, in its annual Christmas display.

I

Each year, in cooperation with the downtown retail merchants' association, the City of Pawtucket, Rhode Island, erects a Christmas display as part of its observance of the Christmas holiday season. The display is situated in a park owned by a nonprofit organization and located in the heart of the shopping district. The display is essentially like those to be found in hundreds of towns or cities across the Nation—often on public grounds—during the Christmas season. The Pawtucket display comprises many of the figures and decorations traditionally associated with Christmas, including, among other things, a Santa Claus house, reindeer pulling Santa's sleigh, candy-striped poles, a Christmas tree, carolers, cutout figures representing such characters as a clown, an elephant, and a teddy bear, hundreds of colored lights, a large banner that reads "SEASONS GREETINGS," and the creche at issue here. All components of this display are owned by the City.

The creche, which has been included in the display for 40 or more years, consists of the traditional figures, including the Infant Jesus, Mary and Joseph, angels, shepherds, kings, and animals, all ranging in height from 5 inches to 5 feet. . . .

Respondents, Pawtucket residents and individual members of the Rhode Island affiliate of the American Civil Liberties Union, and the affiliate itself, brought this action in the United States District Court for Rhode Island, challenging the City's inclusion of the creche in the annual display. The District Court held that the City's inclusion of the creche in the display violates the Establishment Clause, which is binding on the states through the Fourteenth Amendment. The District Court found that by including the creche in the Christmas display, the City has "tried to endorse and promulgate religious beliefs," and that "erection of the creche has the real and substantial effect of affiliating the City with the Christian beliefs that the creche represents". . . .

No significant segment of our society and no institution within it can exist in a vacuum or in total or absolute isolation from all the other parts, much less from government. "It has

never been thought either possible or desirable to enforce a regime of total separation. . . ." Nor does the Constitution require complete separation of church and state; it affirmatively mandates accommodation, not merely tolerance of all religions, and forbids hostility toward any. Anything less would require the "callous indifference" we have said was never intended by the Establishment Clause. Indeed, we have observed, such hostility would bring us into "war with our national tradition as embodied in the First Amendment's guaranty of the free exercise of religion". . . .

Our history is replete with official references to the value and invocation of Divine guidance in deliberations and pronouncements of the Founding Fathers and contemporary leaders. . . .

Executive Orders and other official announcements of Presidents and of the Congress have proclaimed both Christmas and Thanksgiving National Holidays in religious terms. And, by Acts of Congress, it has long been the practice that federal employees are released from duties on these National Holidays, while being paid from the same public revenues that provide the compensation of the Chaplains of the Senate and the House and the military services. Thus, it is clear that government has long recognized—indeed it has subsidized—holidays with religious significance. . . .

Art galleries supported by public revenues display religious paintings of the 15th and 16th centuries, predominantly inspired by one religious faith. . . . The very chamber in which oral arguments on this case were heard is decorated with a notable and permanent—not seasonal—symbol of religion: Moses with Ten Commandments. Congress has long provided chapels in the Capitol for religious worship and meditation.

There are countless other illustrations of the Government's acknowledgment of our religious heritage and governmental sponsorship of graphic manifestations of that heritage. . . .

This history may help explain why the Court consistently has declined to take a rigid, absolutist view of the Establishment Clause. We have refused "to construe the Religion Clauses with a literalness that would undermine the ultimate constitutional objective *as illuminated by history*." In our modern, complex society, whose traditions and constitutional underpinnings rest on and encourage diversity and pluralism in all areas, an absolutist approach in applying the Establishment Clause is simplistic and has been uniformly rejected by the Court.

Rather than mechanically invalidating all governmental conduct or statutes that confer benefits or give special recognition to religion in general or to one faith—as an absolutist approach would dictate—the Court has scrutinized challenged legislation or official conduct to determine whether, in reality, it establishes a religion or religious faith, or tends to. . . .

The District Court inferred from the religious nature of the creche that the City has no secular purpose for the display. In so doing, it rejected the City's claim that its reasons for including the creche are essentially the same as its reasons for sponsoring the display as a whole. The District Court plainly erred by focusing almost exclusively on the creche. When viewed in the proper context of the Christmas Holiday season, it is apparent that, on this record, there is insufficient evidence to establish that the inclusion of the creche is a purposeful or surreptitious effort to express some kind of subtle governmental advocacy of a particular religious message. In a pluralistic society a variety of motives and purposes are implicated. The City, like the Congresses and Presidents, however, has principally taken note of a significant historical religious event long celebrated in the Western World. The creche in the diplay depicts the historical origins of this traditional event long recognized as a National Holiday.

The narrow question is whether there is a secular purpose for Pawtucket's display of the creche. The display is sponsored by the City to celebrate the Holiday and to depict the origins of that Holiday. These are legitimate secular purposes. The District Court's inference, drawn from the religious nature of the creche, that the City has no secular purpose was, on this record, clearly erroneous.

The District Court found that the primary effect of including the creche is to confer a substantial and impermissible benefit on religion in general and on the Christian faith in particular. Comparisons of the relative benefits to religion of different forms of governmental support are elusive and difficult to make. But to conclude that the primary effect of including the creche is to advance religion in violation of the Establishment Clause would require that we view it as more beneficial to and more an endorsement of religion, for example, than expenditure of large sums of public money for textbooks supplied throughout the country to students attending church-sponsored schools, expenditure of public funds for transportation of students to church-sponsored institutions of higher education combining secular and religious education, noncategorical grants to church-sponsored colleges and universities, and the tax exemptions for church properties sanctioned in *Walz*. . . .

We are unable to discern a greater aid to religion deriving from inclusion of the creche than from these benefits and endorsements previously held not violative of the Establishment Clause. . . .

The dissent asserts some observers may perceive that the City has aligned itself with the Christian faith by including a Christian symbol in its display and that this serves to advance religion. We can assume, *arguendo*, that the display advances religion in a sense; but our precedents plainly contemplate that on occasion some advancement of religion will result from

governmental action. The Court has made it abundantly clear, however, that "not every law that confers an 'indirect,' 'remote,' or 'incidental' benefit upon [religion] is, for that reason alone, constitutionally invalid." Here, whatever benefit to one faith or religion or to all religions, is indirect, remote and incidental; display of the creche is no more an advancement or endorsement of religion than the Congressional and Executive recognition of the origins of the Holiday itself as "Christ's Mass," or the exhibition of literally hundreds of religious paintings in governmentally supported museums. . . .

We are satisfied that the City has a secular purpose for including the creche, that the City has not impermissibly advanced religion, and that including the creche does not create excessive entanglement between religion and government. . . .

Of course the creche is identified with one religious faith but no more so than the examples we have set out from prior cases in which we found no conflict with the Establishment Clause. It would be ironic, however, if the inclusion of a single symbol of a particular historic religious event, as part of a celebration acknowledged in the Western World for 20 centuries, and in this country by the people, by the Executive Branch, by the Congress, and the courts for two centuries, would so "taint" the City's exhibit as to render it violative of the Establishment Clause. To forbid the use of this one passive symbol—the creche—at the very time people are taking note of the season with Christmas hymns and carols in public schools and other public places, and while the Congress and Legislatures open sessions with prayers by paid chaplains would be a stilted over-reaction contrary to our history and to our holdings. If the presence of the creche in this display violates the Establishment Clause, a host of other forms of taking official note of Christmas, and of our religious heritage, are equally offensive to the Constitution.

We hold that, notwithstanding the religious significance of the creche, the City of Pawtucket has not violated the Establishment Clause of the First Amendment. Accordingly, the judgment of the Court of Appeals is reversed.

Justice Brennan, with whom Justice Marshall, Justice Blackmun and Justice Stevens join, dissenting.

Despite the narrow contours of the Court's opinion, our precedents in my view compel the holding that Pawtucket's inclusion of a life-sized display depicting the biblical description of the birth of Christ as part of its annual Christmas celebration is unconstitutional. Nothing in the history of such practices or the setting in which the City's creche is presented obscures or diminishes the plain fact that Pawtucket's action amounts to an impermissible governmental endorsement of a particular faith. . . .

. . . I am convinced that this case appears hard not because the principles of decision are obscure, but because the Christmas holiday seems so familiar and agreeable. Although the Court's reluctance to disturb a community's chosen method of celebrating such an agreeable holiday is understandable, that cannot justify the Court's departure from controlling precedent. In my view, Pawtucket's maintenance and display at public expense of a symbol as distinctively sectarian as a creche simply cannot be squared with our prior cases. And it is plainly contrary to the purposes and values of the Establishment Clause to pretend, as the Court does, that the otherwise secular setting of Pawtucket's nativity scene dilutes in some fashion the creche's singular religiosity, or that the City's annual display reflects nothing more than an "acknowledgment" of our shared national heritage. Neither the character of the Christmas holiday itself, nor our heritage of religious expression supports this result. . . .

As we have sought to meet new problems arising under the Establishment Clause, our decisions, with few exceptions, have demanded that a challenged governmental practice satisfy the following criteria:

> "First, the [practice] must have a secular legislative purpose; second, its principal or primary effect must be one that neither advances nor inhibits religion; finally, [it] must not foster 'an excessive government entanglement with religion.'"

This well-defined three-part test expresses the essential concerns animating the Establishment Clause. Thus, the test is designed to ensure that the organs of government remain strictly separate and apart from religious affairs, for "a union of government and religion tends to destroy government and degrade religion." . . .

Applying the three-part test to Pawtucket's creche, I am persuaded that the City's inclusion of the creche in its Christmas display simply does not reflect a "clearly secular purpose." . . .

The "primary effect" of including a nativity scene in the City's display is, as the District Court found, to place the government's imprimatur of approval on the particular religious beliefs exemplified by the creche. Those who believe in the message of the nativity receive the unique and exclusive benefit of public recognition and approval of their views. For many, the City's decision to include the creche as part of its extensive and costly efforts to celebrate Christmas can only mean that the prestige of the government has been conferred on the beliefs associated with the creche, thereby providing "a significant symbolic benefit to religion. . . ."

The effect on minority religious groups, as well as on those who may reject all religion, is to convey the message that

their views are not similarly worthy of public recognition nor entitled to public support. It was precisely this sort of religious chauvinism that the Establishment Clause was intended forever to prohibit....

Furthermore, the Court should not blind itself to the fact that because communities differ in religious composition, the controversy over whether local governments may adopt religious symbols will continue to fester. In many communities, non-Christian groups can be expected to combat practices similar to Pawtucket's; this will be so especially in areas where there are substantial non-Christian minorities....

The Court advances two principal arguments to support its conclusion that the Pawtucket creche satisfies the *Lemon* test. Neither is persuasive....

First. The Court, by focusing on the holiday "context" in which the nativity scene appeared, seeks to explain away the clear religious import of the creche and the findings of the District Court that most observers understood the creche as both a symbol of Christian beliefs and a symbol of the City's support for those beliefs.... But it blinks reality to claim, as the Court does, that by including such a distinctively religious object as the creche in its Christmas display, Pawtucket has done no more than make use of a "traditional" symbol of the holiday, and has thereby purged the creche of its religious content and conferred only an "incidental and indirect" benefit on religion....

Second. The Court also attempts to justify the creche by entertaining a beguilingly simple, yet faulty syllogism. The Court begins by noting that government may recognize Christmas day as a public holiday; the Court then asserts that the creche is nothing more than a traditional element of Christmas celebrations; and it concludes that the inclusion of a creche as part of a government's annual Christmas celebration is constitutionally permissible. The Court apparently believes that once it finds that the designation of Christmas as a public holiday is constitutionally acceptable, it is then free to conclude that virtually every form of governmental association with the celebration of the holiday is also constitutional. The vice of this dangerously superficial argument is that it overlooks the fact that the Christmas holiday in our national culture contains both secular and sectarian elements. To say that government may recognize the holiday's traditional, secular elements of gift-giving, public festivities and community spirit, does not mean that government may indiscriminately embrace the distinctively sectarian aspects of the holiday. Indeed, in its eagerness to approve the creche, the Court has advanced a rationale so simplistic that it would appear to allow the Mayor of Pawtucket to participate in the celebration of a Christmas mass, since this would be just another unobjectionable way for the City to "celebrate the holiday." As is demonstrated below, the Court's logic is fundamentally flawed both because it obscures the reason why public designation of Christmas day as a holiday is constitutionally acceptable, and blurs the distinction between the secular aspects of Christmas and its distinctively religious character, as exemplified by the creche.

When government decides to recognize Christmas day as a public holiday, it does no more than accommodate the calendar of public activities to the plain fact that many Americans will expect on that day to spend time visiting with their families, attending religious services, and perhaps enjoying some respite from pre-holiday activities. The Free Exercise Clause, of course, does not necessarily compel the government to provide this accommodation, but neither is the Establishment Clause offended by such a step. Because it is clear that the celebration of Christmas has both secular and sectarian elements, it may well be that by taking note of the holiday, the government is simply seeking to serve the same kinds of wholly secular goals—for instance, promoting goodwill and a common day of rest—that were found to justify Sunday Closing laws in *McGowan*. If public officials go further and participate in the *secular* celebration of Christmas—by, for example, decorating public places with such secular images as wreaths, garlands or Santa Claus figures—they move closer to the limits of their constitutional power but nevertheless remain within the boundaries set by the Establishment Clause. But when those officials participate in or appear to endorse the distinctively religious elements of this otherwise secular event, they encroach upon First Amendment freedoms. For it is at that point that the government brings to the forefront the theological content of the holiday, and places the prestige, power and financial support of a civil authority in the service of a particular faith.

The inclusion of a creche in Pawtucket's otherwise secular celebration of Christmas clearly violates these principles. Unlike such secular figures as Santa Claus, reindeer and carolers, a nativity scene represents far more than a mere "traditional" symbol of Christmas. The essence of the creche's symbolic purpose and effect is to prompt the observer to experience a sense of simple awe and wonder appropriate to the contemplation of one of the central elements of Christian dogma—that God sent His son into the world to be a Messiah. Contrary to the Court's suggestion, the creche is far from a mere representation of a "particular historic religious event." It is, instead, best understood as a mystical re-creation of an event that lies at the heart of Christian faith. To suggest, as the Court does, that such a symbol is merely "traditional" and therefore no different from Santa's house or reindeer is not only offensive to those for whom the creche has profound significance, but insulting to those who insist for religious or personal reasons that the story of Christ is in no sense a part of "history" nor an unavoidable element of our national "heritage."

For these reasons, the creche in this context simply cannot be viewed as playing the same role that an ordinary museum display does....

The Court seems to assume that forbidding Pawtucket from displaying a creche would be tantamount to forbidding a state college from including the bible or Milton's Paradise Lost in a course on English literature. But in those cases the religiously-inspired materials are being considered solely as literature. The purpose is plainly not to single out the particular religious beliefs that may have inspired the authors, but to see in these writings the outlines of a larger imaginative universe shared with other forms of literary expression....

In the absence of any other religious symbols or of any neutral disclaimer, the inescapable effect of the creche will be to remind the average observer of the religious roots of the celebration he is witnessing and to call to mind the scriptural message that the nativity symbolizes. The fact that Pawtucket has gone to the trouble of making such an elaborate public celebration and of including a creche in that otherwise secular setting inevitably serves to reinforce the sense that the City means to express solidarity with the Christian message of the creche and to dismiss other faiths as unworthy of similar attention and support.

Although the Court's relaxed application of the *Lemon* test to Pawtucket's creche is regrettable, it is at least understandable and properly limited to the particular facts of this case. The Court's opinion, however, also sounds a broader and more troubling theme. Invoking the celebration of Thanksgiving as a public holiday, the legend "In God We Trust" on our coins, and the proclamation "God save the United States and this Honorable Court" at the opening of judicial sessions, the Court asserts, without explanation, that Pawtucket's inclusion of a creche in its annual Christmas display poses no more of a threat to Establishment Clause values than these other official "acknowlegments" of religion....

... The Court has never comprehensively addressed the extent to which government may acknowledge religion by, for example, incorporating religious references into public ceremonies and proclamations, and I do not presume to offer a comprehensive approach. Nevertheless, it appears from our prior decisions that at least three principles—tracing the narrow channels which government acknowledgments must follow to satisfy the Establishment Clause—may be identified. First, although the government may not be compelled to do so by the Free Exercise Clause, it may, consistently with the Establishment Clause, act to accommodate to some extent the opportunities of individuals to practice their religion.

Finally, we have noted that government cannot be completely prohibited from recognizing in its public actions the religious beliefs and practices of the American people as an aspect of our national history and culture. While I remain uncertain about these questions, I would suggest that such practices as the designation of "In God We Trust" as our national motto, or the references to God contained in the Pledge of Allegiance can best be understood, ... as a form of "ceremonial deism," protected from Establishment Clause scrutiny chiefly because they have lost through rote repetition any significant religious content. Moreover, these references are uniquely suited to serve such wholly secular purposes as solemnizing public occasions, or inspiring commitment to meet some national challenge in a manner that simply could not be fully served in our culture if government were limited to purely non-religious phrases. The practices by which the government has long acknowledged religion are therefore probably necessary to serve certain secular functions, and that necessity, coupled with their long history, gives those practices an essentially secular meaning.

The creche fits none of these categories. Inclusion of the creche is not necessary to accommodate individual religious expression. This is plainly not the case in which individual residents of Pawtucket have claimed the right to place a creche as part of a wholly private display on public land. Nor is the inclusion of the creche necessary to serve wholly secular goals; it is clear that the City's secular purposes of celebrating the Christmas holiday and promoting retail commerce can be fully served without the creche. And the creche, because of its unique association with Christianity, is clearly more sectarian than those references to God that we accept in ceremonial phrases or in other contexts that assure neutrality. The religious works on display at the National Gallery, Presidential references to God during an Inaugural Address, or the national motto present no risk of establishing religion. To be sure, our understanding of these expressions may begin in contemplation of some religious element, but it does not end there. Their message is dominantly secular. In contrast, the message of the creche begins and ends with reverence for a particular image of the divine....

The American historical experience concerning the public celebration of Christmas, if carefully examined, provides no support for the Court's decision....

Indeed, the Court's approach suggests a fundamental misapprehension of the proper uses of history in constitutional interpretation. Certainly, our decisions reflect the fact that an awareness of historical practice often can provide a useful guide in interpreting the abstract language of the Establishment Clause.... But historical acceptance of a particular practice alone is never sufficient to justify a challenged governmental action, since, as the Court has rightly observed, "no one acquires a vested or protected right in violation of the Constitution by long use, even when that span of time covers our entire national existence and indeed predates it."... Attention to the details of history should not blind us to the cardinal pur-

poses of the Establishment Clause, nor limit our central inquiry in these cases—whether the challenged practices "threaten those consequences which the Framers deeply feared."...

The intent of the Framers with respect to the public display of nativity scenes is virtually impossible to discern primarily because the widespread celebration of Christmas did not emerge in its present form until well into the nineteenth century....

Furthermore, unlike the religious tax exemptions upheld in *Walz*, the public display of nativity scenes as part of governmental celebrations of Christmas does not come to us supported by an unbroken history of widespread acceptance. It was not until 1836 that a State first granted legal recognition to Christmas as a public holiday. This was followed in the period between 1845 and 1865, by twenty-eight jurisdictions which included Christmas day as a legal holiday. Congress did not follow the States' lead until 1870 when it established December 25th, along with the Fourth of July, New Year's Day, and Thanksgiving, as a legal holiday in the District of Columbia. This pattern of legal recognition tells us only that public acceptance of the holiday was gradual and that the practice—in stark contrast to the record presented in either *Walz* or *Marsh*—did not take on the character of a widely recognized holiday until the middle of the nineteenth century....

In sum, there is no evidence whatsoever that the Framers would have expressly approved a Federal celebration of the Christmas holiday including public displays of a nativity scene.... Nor is there any suggestion that publicly financed and supported displays of Christmas creches are supported by a record of widespread, undeviating acceptance that extends throughout our history. Therefore, our prior decisions which relied upon concrete, specific historical evidence to support a particular practice simply have no bearing on the question presented in this case. Contrary to today's careless decision, those prior cases have all recognized that the "illumination" provided by history must always be focused on the particular practice at issue in a given case. Without that guiding principle and the intellectual discipline it imposes, the Court is at sea, free to select random elements of America's varied history solely to suit the views of five Members of this Court....

Justice Blackmun, with whom Justice Stevens joins, dissenting....

Not only does the Court's resolution of this controversy make light of our precedents, but also, ironically, the majority does an injustice to the creche and the message it manifests. While certain persons, including the Mayor of Pawtucket, undertook a crusade to "keep Christ in Christmas," the Court today has declared that presence virtually irrelevant. The majority urges that the display, "with or without a creche," recall[s] the religious nature of the Holiday," and "engenders a friendly community spirit of good will in keeping with the season." Before the District Court, an expert witness for the city made a similar, though perhaps more candid, point, stating that Pawtucket's display invites people "to participate in the Christmas spirit, brotherhood, peace, and let loose with their money." The creche has been relegated to the role of a neutral harbinger of the holiday season, useful for commercial purposes, but devoid of any inherent meaning and incapable of enhancing the religious tenor of a display of which it is an integral part. The city has its victory—but it is a Pyrrhic one indeed.

The import of the Court's decision is to encourage use of the creche in a municipally sponsored display, a setting where Christians feel constrained in acknowledging its symbolic meaning and non-Christians feel alienated by its presence. Surely, this is a misuse of a sacred symbol. Because I cannot join the Court in denying either the force of our precedents or the sacred message that is at the core of the creche, I dissent and join Justice Brennan's opinion.

Questions for Discussion

1. Tax exemptions obviously confer a benefit on religious institutions. In interpreting the words of the Constitution, should the Justices be guided primarily by consistent historical practice? What are the dangers, if any, in this approach? Is the concept of "benevolent neutrality" a useful one?

2. Is there not a considerable difference between accommodating tax exemptions and accommodating legislative chaplains within the constitutional framework? Is there any secular justification for prayers in a legislative body?

3. If legislators can have prayers, why not schoolchildren?

4. Assuming that you were a Justice and would have to cast a vote on the chaplain issue, would you vote with Burger or Brennan? Why?

5. The Court has followed an approach that seems to require it to secularize religious symbols to uphold their use. Does this make sense to you? Does Burger defend the decision on the display of the creche well? What points do Brennan and Blackmun make, if any, that seem sound to you?

6. Finally, do you believe that, if the decision was against the display of the creche, the Court would be asked to ban the singing of Christmas carols in public buildings?

Suggestions for Additional Reading

Writing on the subject of religion and government in the United States is in no scarce supply. Articles abound in newspapers and popular periodicals, and books continue to tumble from the presses. The titles listed below are chosen to present a readable and balanced sample of the writing in the field.

Abraham, Henry J. *Freedom and the Court: Civil Rights and Liberties in the United States.* 4th ed. New York: Oxford University Press, 1982. This paperback volume has a substantial section on the subject of religion, but is is also helpful in tracing the history of the Fourteenth Amendment and its subsequent use as a vehicle to apply the First Amendment to the states.

Buzzard, Lynn R. & Ericsson, Samuel. *The Battle for Religious Freedom.* Elgin, Ill.: David C. Cook Publishing Co., 1982. Illustrative of a good deal of recent writing, this paperback suggests that religious liberty is threatened in the United States by improper governmental intervention in religious matters. Accusing courts and other governmental agencies of pursuing the goal of a completely secularized state, the authors provide case studies that enliven their treatment.

Clebsch, William A. *From Sacred to Profane America: The Role of Religion in American History.* New York: Harper & Row, 1968. This provocative book highlights the achievements of religious motivation in our history but also notes the frustration experienced by believers when their success redounds to the glory of the secular state.

Cord, Robert L. *Separation of Church and State: Historical Fact and Current Fiction.* New York: Lambeth Press, 1982. An attack on the Supreme Court's use of history in interpreting the religious clauses, this book investigates the basic historical material and concludes that the Justices have erred.

Cousins, Norman. ed. *'In God We Trust:' The Religious Beliefs and Ideas of American Founding Fathers.* New York: Harper, 1958. Although the editor provides some introduction, the volume consists primarily of the words of the influential American statesmen who worked to create the nation.

Handy, Robert L. *A Christian America: Protestant Hopes and Historical Realities.* New York: Oxford University Press, 1971. The author surveys the evangelical effort to create a Christian civilization in the United States. He analyzes both the internal and external problems that plagued the crusade.

Howe, Mark D. *The Garden and the Wilderness: Religion and Government in American Constitutional History.* Chicago: University of Chicago Press, 1965. The essays here are fresh and original, and fundamental concepts are presented with both clarity and style. Howe has considerable respect for the nation's religious heritage.

Hudson, Winthrop S. *Religion in America: An Historical Account of the Development of American Religious Life.* 3rd ed. New York Scribner, 1981. This broad historical survey is both thorough and concise in its treatment of key issues. It is enjoyable to read.

Humphrey, Edward F. *Nationalism and Religion in America, 1774-1789.* New York: Russell & Russell, 1965. This study, originally published in 1924, is the most scholarly book on this list. It includes substantial quotations from original sources, and the writing does not always flow smoothly. Yet, on the subjects of the interconnection of religious and civil freedom and on the real contributions religious sects made to the creation of the American nation it has no real peer.

Manning, Leonard F. *The Law of Church-State Relations in a Nutshell.* St. Paul: West Publishing Co., 1981. From a legal perspective, that is, a perspective valuing consistency and a degree of predicability, this book covers the cases on religion that the Supreme Court has decided. It is chosen over other treatments because it is a fairly objective account.

Pfeffer, Leo. *Church, State and Freedom.* Rev. ed. Boston: Beacon Press, 1967. A comprehensive historical survey, this volume was written by one of the most noted advocates of a rigid separation between religion and government. He is a lawyer who has represented litigants in cases dealing with religion before the Supreme Court. His work is well-written, and the reader is never in doubt where the author stands.

Semonche, John E. *Religion and Constitutional Government: A Historical Overview with Sources*. Carrboro, NC: Signal Books, forthcoming July, 1985. This volume, which contains readings similar to those found in the present anthology, is useful for its extended and generally balanced essay on the relationship between religion and government in the United States from colonial times to present.

Stokes, Anson P. *Church and State in the United States*. 3 vols. New York: Harper & Brothers, 1950. This is the classic work in the field, a lode of information that all subsequent writers in the field have mined. The book is not tightly organized and although the writing is clear, its sheer volume discourages readers. A single volume edition, abridged and modified by Leo Pfeffer (see listing above) appeared in 1964. This latter version is still in print, but it is a version in which Pfeffer, not Stokes, has the last word. To get the unadulterated Stokes, with his balance and sensitivity, you need to consult the original edition.